90-385

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH HENNEBERRY,

Petitioner,

v.

RICHARD LEE SUTTON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

EVELYN O. CANNON*
ANDREW H. BAIDA
EMORY A. PLITT, JR.
Assistant Attorneys General
200 St. Paul Place, 20th Flr.
Baltimore, Maryland 21202
(301) 576-6330

Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED

Is the *Ex Post Facto* Clause (Art. I, § 10) violated by a statutory change in Maryland's parole procedures which adds a gubernatorial approval requirement to the prior requirement that an inmate's parole is subject to the discretionary decision of a parole board?

LIST OF PARTIES

The parties to this proceeding below were Norma Gluckstern, formerly Director of Patuxent Institution, appellant in the court below, and Richard Lee Sutton, appellee below. Petitioner Joseph Henneberry is the present Director of Patuxent Institution.

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PETITION FOR WRIT OF CERTIORARI

Joseph Henneberry, Director of Patuxent Institution, a facility operated by the State of Maryland, respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeals of Maryland, which held that statutory changes affecting the discretionary decision to grant parole from Patuxent violate the *Ex Post Facto* Clause of the United States Constitution.

OPINIONS BELOW

The Court of Appeals of Maryland and the Circuit Court for Baltimore County have decided the issue raised by this petition. The June 7, 1990 opinion of

the Court of Appeals, captioned *Gluckstern v. Sutton*, is reported at 319 Md. 634, 574 A.2d 898, and is reprinted in the appendix to this petition ("App.") at 1a-43a. The July 13, 1988 opinion of the circuit court is unreported and reprinted at App. 44a-48a.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on June 7, 1990. This petition was filed within 90 days of that judgment; therefore, this Court has jurisdiction pursuant to 28 U.S.C. §§ 1257 and 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case are Art. I, § 10 of the United States Constitution; Art. 31B, § 13(d), Md. Ann. Code (1971 Repl. Vol., 1975 Cum. Supp.); Art. 31B, § 11(b)(2) (1976 Repl. Vol., 1978 Supp.); and Art. 31B, § 11(b)(2) (1976 Repl. Vol., 1982 Supp.), all of which are reproduced beginning at App. 51a.

STATEMENT OF THE CASE

A. The law at the time of Sutton's murder convictions.

In 1974, respondent Richard Lee Sutton killed his wife's parents with a handgun. (App. at 2a.) On January 10, 1975, Mr. Sutton was convicted in the Circuit Court for Baltimore County of two counts of first degree murder and two handgun violations, and was sentenced to two concurrent terms of life imprisonment and two concurrent twelve year terms of im-

prisonment. (App. at 2a.) The circuit court also ordered that Mr. Sutton be sent to and examined by the Patuxent Institution, a state institution for "defective delinquents", to determine whether he was a "defective delinquent" as that term was defined by Art. 31B, § 5, Md. Ann. Code (1971 Repl. Vol., 1975 Cum. Supp.). (App. at 2a.) Following that examination, on July 17, 1975, the court found Mr. Sutton to be a defective delinquent, suspended his sentence and ordered him committed to Patuxent for confinement for an indeterminate period of time. (App. at 2a-3a.)

At the time of Mr. Sutton's commitment, the law provided that if a person was found to be a defective delinquent and committed to Patuxent, that person's original sentence was suspended and replaced with a sentence of confinement at Patuxent for "an indeterminate period without either maximum or minimum limits." Art. 31, § 9(b) (1971 Repl. Vol., 1975 Cum. Supp.). Thus, Maryland law provided that a person committed to Patuxent could be confined for a period of time that exceeded the original sentence. Conversely, Mr. Sutton and others committed to Patuxent could also be released on parole at any time.

When Mr. Sutton was committed to Patuxent in 1975, the statute governing parole provided that "[i]f the institutional board of review as a result of its review and reexamination of any person [confined at Patuxent] believes that it may be for his benefit and for the benefit of society to grant him . . . parole from the institution for defective delinquents, it *may* proceed to arrange for such . . . parole." Art. 31b, § 13(d), Md. Ann. Code (1971 Repl. Vol., 1975 Cum. Supp.) (emphasis added). Thus, the Institutional Board

of Review ("Board"), which reviewed each person at Patuxent yearly, had broad discretion to grant (or deny) parole to Patuxent inmates.

In contrast to a Patuxent inmate's immediate eligibility for parole at the discretion of the Board, an inmate not committed to Patuxent who, like Mr. Sutton, was sentenced to life imprisonment, was ineligible for parole until that person served fifteen years of his sentence. Art. 41, § 122(b), Md. Ann. Code (1971 Repl. Vol., 1975 Cum. Supp.). To be paroled, such an inmate had to obtain the approval of both the Maryland Parole Commission (subsequently renamed the Maryland Board of Parole) and the Governor. *Id.*

B. Subsequent changes in Maryland's parole procedures.

In 1977, the Maryland General Assembly made numerous changes affecting the Patuxent Institution. Among those changes was the abolishment of indeterminate sentences and the reinstatement of each inmate's original sentence. Another change affected the manner in which the Board was to parole inmates, providing that "[i]f the board of review concludes that (1) it will not impose an unreasonable risk on society and (2) it will assist in the treatment and rehabilitation of the [Patuxent inmate], it shall grant a parole from the Institution. . . ." Art. 31B, § 11(b)(2), Md. Ann. Code (1976 Repl Vol., 1978 Cum. Supp.). Thus, the Board still retained broad discretion in deciding whether a Patuxent inmate would be paroled.

In 1982, the statute governing the discretionary parole of Patuxent inmates was amended. The General Assembly added a sentence providing that an

inmate "serving a term of life imprisonment shall only be paroled with the approval of the Governor." Art. 31B, § 11(b)(2) (1976 Repl. Vol., 1982 Cum. Supp.). On October 4, 1984, in accordance with this new requirement, the Board voted to recommend to the Governor that Mr. Sutton be paroled. (App. at 9a.) On September 4, 1985, the Governor refused to grant that approval. (App. at 9a.)[1]

C. Proceedings below.

On November 6, 1987, Mr. Sutton filed a petition for a writ of habeas corpus in the circuit court, contending that the requirement of gubernatorial approval of his parole violated the *Ex Post Facto* Clause of the United States Constitution.[2] The circuit court agreed, ordered the Board to afford Mr. Sutton another parole hearing on the facts and evidence that existed when the Board originally considered his parole request in October of 1984, and further ordered that any decision to parole Mr. Sutton shall not be

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[1] The Court of Appeals found that on June 5, 1986, the Board voted again to parole Mr. Sutton and that the Governor denied this request. (App. at 9a.) In fact, although the Board did vote to resubmit Mr. Sutton's name to the Governor, before his name was resubmitted the Board revoked his work release status as a result of Mr. Sutton's violations of work release rules. The Board has not made any recommendation to the Governor to parole Mr. Sutton since October 4, 1984.

[2] Mr. Sutton also claimed that the changes violated the counterpart provision of Maryland's constitution. This was a purely redundant claim as the " 'ex post facto clause in the Maryland Declaration of Rights . . . has been viewed as having the same meaning as the federal prohibition.' " (App. at 31a) (quoting *Anderson v. Department of Health and Mental Hygiene*, 310 Md. 217, 223, 528 A.2d 904, 907 (1987), *cert. denied*, 485 U.S. 913 (1988)).

subject to the approval of the Governor. (App. at 44a-50a.) On appeal, the Court of Appeals, Maryland's highest court, affirmed, with one judge dissenting, and held that "under the ex post facto clauses of the federal and state constitutions, the requirement of gubernatorial approval could not be applied to a decision by the Institutional Board of Review to parole Mr. Sutton." (App. at 31a.)[3]

REASONS FOR GRANTING REVIEW

SUMMARY

This case presents the important question of whether the *Ex Post Facto* Clause prevents the states from revising their parole procedures when those changes do not alter the core requirement that parole is completely discretionary. This case warrants review because the decision of Maryland's highest court conflicts with decisions of this Court (including a decision issued two weeks after this case was decided) at the expense of the states' need to improve their criminal justice systems. Contrary to the premise of the decision here, this and other courts have recognized that state legislatures must have the flexibility to enact

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[3] On August 8, 1990, the Board of Review approved parole for Mr. Sutton, who remains confined at Patuxent pending the disposition of the State's request that his parole be revoked. Even if released, however, Mr. Sutton's parole is subject to the continuing supervision and annual approval of the Board of Review. *See* Md. Ann. Code, Art. 31B, §11(b)(2) (1976 Repl. Vol., 1978 Cum. Supp.). Further, his parole will automatically terminate if the decision below which invalidated the gubernatorial approval requirement is reversed. Therefore, this case presents a live and present controversy. *See Mabry v. Johnson*, 467 U.S. 504, 507 n.3 (1984); *Jago v. Van Curen*, 454 U.S. 14, 21 n.3 (1981); *Jones v. Cunningham*, 371 U.S. 236 (1963).

new measures to enhance the effectiveness and safety of their post-conviction release procedures. Simply put, the court below was simply wrong as not all retroactively applicable changes in parole procedures are constitutionally invalid under the *Ex Post Facto* Clause.

Prison parole procedures are matters of acute state and public concern. Discouraging innovation is the ultimate—and very high—cost of a rigid rule of federal constitutional law which bars states from changing parole procedures. Maryland's highest court gave a highly restrictive, indeed tortured, reading to a constitutional provision which is entitled, as this Court's decisions establish, to a more flexible and realistic interpretation. This Court should review and correct that erroneous decision.

THIS CASE PRESENTS THE IMPORTANT CONSTITUTIONAL QUESTION OF WHETHER THE *EX POST FACTO* CLAUSE IS VIOLATED BY A LAW THAT ALTERS THE MANNER IN WHICH THE DISCRETIONARY DECISION TO APPROVE PAROLE IS EXERCISED BUT DOES NOT AFFECT PAROLE ELIGIBILITY.

I. The Decision Below Conflicts With Controlling Decisions Of This Court.

The core issue in this case is whether Maryland's statute, by simply increasing the number of individuals who make the discretionary decision to grant or deny parole, imposes a constitutionally-prohibited "disadvantage." When respondent was convicted of murdering his wife's parents, the statute provided that the Board of Review, in its discretion, "may" grant him parole if it believed it was "for his benefit and for the benefit of society. . . ." Art. 31B, § 13(d),

Md. Ann. Code (1971 Repl. Vol., 1975 Cum. Supp.). The Court of Appeals held that the 1982 statute, which added the requirement of gubernatorial approval for parole, violated the *Ex Post Facto* Clause because that amendment in parole procedures "clearly operated to Mr. Sutton's disadvantage." (App. at 36a.)

That narrow statutory change does not, however, constitute a violation of the *Ex Post Facto* Clause. "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver v. Graham*, 450 U.S. 24, 30 (1981). The *Ex Post Facto* Clause, therefore, prohibits a retroactive statutory change which alters "the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of punishment imposed for its commission, . . . to the disadvantage of the accused." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). *See also Calder v. Bull*, 3 Dall. 386, 390 (1798).

Thus, while it is well-settled that the *Ex Post Facto* Clause "was intended to secure substantial personal rights against arbitrary and oppressive legislation," it does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Beazell v. Ohio*, 269 U.S. at 171 (citations omitted). Not every retroactive law that results in a "disadvantage" to a party violates the *Ex Post Facto* prohibition. *See, e.g., Thompson v. Missouri*, 171 U.S. 380, 386-87 (1898); *Hopt v. Utah*, 110 U.S. 574, 588-90 (1884); *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915); *Dobbert v. Florida*, 432 U.S.

282, 292-97 (1977); *Collins v. Youngblood*, ___ U.S. ___, 110 S.Ct. 2715 (1990).

The Court of Appeals disregarded these principles and erroneously held that "any law which was passed after the commission of the offence . . . is an *ex post facto* law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed . . . *or which alters the situation of the accused to his disadvantage.*" (App. at 32a) (quotation and citation omitted) (emphasis in original). That holding conflicts directly with this Court's decision in *Collins v. Youngblood*, ___ U.S. ___, 110 S.Ct. 2715 (1990), which post-dated the opinion below and overruled the identical holding in *Kring v. Missouri*, 107 U.S. 221 (1883):

> The holding in *Kring* can only be justified if the *Ex Post Facto* Clause is thought to include not merely the *Calder* categories, but any change which "alters the situation of a party to his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases. We accordingly overrule *Kring*.

110 S.Ct. at 2723.[4]

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[4] The Court of Appeals' now plainly misplaced reliance on *Kring* is unmistakable. (App. at 31a) ("The Supreme Court has enunciated the principle that the prohibition extends broadly to any law passed after the commission of an offense which . . . in relation to that offense, *or its consequences*, alters the situation of a party to his disadvantage. *Kring v. Missouri*, 107 U.S. 221, 235, 2 S.Ct. 443, 455, 27 L.Ed. 506 (1883).") (quotations and citations omitted) (emphasis in original).

The validity of the decision below is also placed in question by this Court's decision in *Collins* to overrule the holding in *Thompson v. Utah*, 170 U.S. 343 (1898), that a law reducing the size of juries in criminal cases from twelve persons to eight violated the *Ex Post Facto* Clause. Changing the individuals who exercise the discretion to grant or deny parole, like changing the size of a jury, does not affect "a right that has anything to do with the definition of crimes, defenses, or punishments, which is the concern of the *Ex Post Facto* Clause." *Collins*, 110 S.Ct. at 2724.

In addition, the decision below squarely conflicts with *Dobbert v. Florida*, 432 U.S. 282 (1977), where this Court held that the *Ex Post Facto* Clause was not violated by a new statute which provided that a jury's recommendation of life imprisonment was no longer binding on the sentencing judge in determining whether the death penalty should be imposed: "The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." *Id.* at 293-94.

As in *Dobbert*, the quantum of punishment attached to Mr. Sutton's crime—a life sentence subject to the *possible* discretionary grant of parole—remains completely unchanged under the new law.[5] Indeed, as the

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[5] The Court of Appeals distinguished *Dobbert*, finding that "[n]ow, both the Institutional Board of Review and the Governor must decide in favor of parole." (App. at 38a.) But this Court rejected an identical claim in *Dobbert* that the new law was more onerous than the old one:

> Petitioner argues that the change in the law harmed him because the jury's recommendation of life im-

dissent below points out, "at the time of Sutton's sentencing in 1975, a person sentenced to life imprisonment for murder could not be paroled without gubernatorial approval. Sutton did not gain a *potential* right to parole without gubernatorial approval until later in 1975 when, as a result of an entirely separate proceeding, he was adjudged a defective delinquent and was transferred to Patuxent Institution." (App. at 42a) (citation omitted) (emphasis added).

Given the notice Mr. Sutton had in 1975 regarding the life sentence he would receive and the substantial hurdles standing between that life sentence and his early release, the subsequent changes in the law "neither deprive [him] of any pre-existing right nor enhance the punishment imposed. The change . . . assisting the [State] in the exercise of its discretion is in the nature of a procedural change found permissible in *Dobbert, supra.*" *Portley v. Grossman*, 444

> prisonment would not have been subject to review by the trial judge under the prior law. But it certainly cannot be said with assurance that, had his trial been conducted under the old statute, the jury would have returned a verdict of life. [Footnote omitted.]
>
> Hence, petitioner's speculation that the jury would have recommended life were the prior procedure in effect is not compelling.

432 U.S. at 294. There is thus no support for the lower court's finding that the 1982 statute makes obtaining parole more difficult. Notwithstanding that the members of the Board recommended parole to the Governor in 1984, like the jury in *Dobbert* in recommending life imprisonment, "[t]hey may have chosen leniency when they knew that that decision rested ultimately on the shoulders of the [Governor], but might not have followed the same course if their vote were final." *Id.* at 294 n.7.

U.S. 1311, 1312-13 (1980) (Rehnquist, J., Circuit Justice).

The change in parole procedures invalidated by the Court of Appeals is not uncommon. As part of their continuing efforts to reform their criminal justice systems, the states routinely revise their parole and release procedures to impose new requirements affecting the discretionary decision to approve parole, including changes requiring the input of different decision makers. *See, e.g., infra* at 12-13. Thus, the potential impact of the Court of Appeals' decision extends far beyond invalidating Maryland's statute requiring gubernatorial approval for the parole of Patuxent inmates. That decision should be reviewed because it constitutes an unprecedented expansion of the protection against *Ex Post Facto* laws.

II. The Decision Below Conflicts With Decisions Of Other Courts Which Hold That Revisions In Parole Procedures Do Not Violate The *Ex Post Facto* Clause.

A further reason for granting review here is that the Court of Appeals' holding conflicts with decisions of other courts. A number of decisions hold, contrary to the decision of the Court of Appeals, that the *Ex Post Facto* Clause is not violated by laws changing the identity and/or size of the parole or release decisionmaker. *See State v. Valenzuela*, 144 Ariz. 43, 695 P.2d 732, 736 (1985) ("there is no violation of the ex post facto prohibition if the procedure is changed so that the adjudication is made by a different entity"); *Perkey v. Psychiatric Security Review Board*, 65 Or. App. 259, 670 P.2d 1061, 1063 (Or. App. 1983) (no *ex post facto* violation in requiring individual "to seek review of his commitment status

in a different forum"); *Mayfield v. Ford*, 664 F.Supp. 1285, 1288-89 (D. Neb. 1987) (no constitutional violation in transferring power to release patient from hospital staff to district court); *Taylor v. Lane*, 191 Ill. App.3d 101, 546 N.E.2d 1178, 1181 (Ill. App. 1989) (rejecting petitioner's argument that changes in law which increased amount of votes needed to be paroled "violate the *ex post facto* prohibition because they decrease his chances for parole"); *Chaka v. Lane*, 685 F.Supp. 1069, 1072-73 (N.D. Ill. 1988) (same); *Gilmore v. Kansas Parole Board*, 243 Kan. 173, 756 P.2d 410, 415-16, *cert. denied*, 488 U.S. 930 (1988) (same).[6]

This Court should resolve this conflict so that the states will know what changes may be made in their parole procedures without violating the *Ex Post Facto* Clause.

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[6] A number of other courts hold that the *Ex Post Facto* Clause is not violated by changes in parole or other release procedures adding requirements which may affect the discretionary decision to release an individual. *See Raimondo v. Belletire*, 789 F.2d 492, 495-96 (7th Cir. 1986) ("Raimondo cites no case to support his position that adding the chance for additional discretionary review is the type of procedural change that is so far-reaching that it amounts to a change in substantive rights."); *Mosley v. Klincar*, 711 F.Supp. 463, 468 (N.D. Ill. 1989) ("[T]he [new] notification requirement tends to reduce the prisoner's chances of receiving parole. . . Regardless of its potentially adverse impact on prisoners who seek parole, the notice requirement challenged by Mosley does not alter any substantive criminal law."); *Gattis v. Parole and Probation Commission*, 535 So.2d 640, 642 (Fla. App. 1988) (holding that statutory changes which allow the sentencing court to object to parole release "represent a mere procedural change in or enlargement of the manner by which the Commission may exercise its discretion").

CONCLUSION

For the reasons stated, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland. Following review, that judgment should be reversed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

EVELYN O. CANNON*
ANDREW H. BAIDA
EMORY A. PLITT, JR.
Assistant Attorneys General
200 St. Paul Place, 20th Flr.
Baltimore, Maryland 21202
(301) 576-6330

Attorneys for Petitioner

**Counsel of Record*

APPENDIX

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IN THE COURT OF APPEALS OF MARYLAND

No. 107

September Term, 1988

NORMA GLUCKSTERN

v.

RICHARD LEE SUTTON

Murphy, C.J.
Eldridge
Cole
Rodowsky
McAuliffe
Adkins
***Blackwell,**
JJ.

Opinion by Eldridge, J.
McAuliffe, J., dissents.

Filed: June 7, 1990

This habeas corpus case presents issues relating to the timeliness of the petitioner's notice of appeal, the right of the petitioner to take an appeal, and the ex post facto clauses of the Maryland and federal constitutions.[1] The ex

* Blackwell, J., now retired, participated in the hearing and conference of this case while an active member of this Court but did not participate in the decision and adoption of this opinion.

[1] Maryland Declaration of Rights, Art. 17; Constitution of the United States, Art. I, § 10, cl. 1.

post facto issue concerns the retroactive application of statutory changes in the requirements for parole from the Patuxent Institution.

I.

The underlying facts and pertinent statutory background are as follows.

A.

On March 5, 1974, in the course of a heated argument at the home of his estranged wife's parents, Richard Lee Sutton killed both of his wife's parents with a handgun. On January 10, 1975, in the Circuit Court for Baltimore County, Mr. Sutton was convicted on two counts of first degree murder and two counts of using a handgun in the commission of a felony or crime of violence. He was immediately sentenced to two concurrent terms of twelve years imprisonment for the handgun offenses, although the twelve year sentences were to be consecutive to the life sentences.

Also on January 10, 1975, the circuit court found that there was reasonable cause to believe that Mr. Sutton was a defective delinquent, and the court ordered that he be delivered to the Patuxent Institution for examination pursuant to Maryland Code (1957, 1971 Repl. Vol.), Art. 31B.[2]

The circuit court on July 17, 1975, following a hearing, found that Mr. Sutton was a defective delinquent within

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[2] For discussions of the nature of the Patuxent Institution, the "Defective Delinquency Law," and the applicable statutes from time to time, *see, e.g.*, McNeil v. Director, Patuxent Institution, 407 U.S. 245, 92 S.Ct. 2083, 32 L.Ed.2d 719 (1972); Watson v. State, 286 Md. 291, 296-300, 407 A.2d 324 (1979); Williams and Fulwood v. Director, 276 Md. 272, 347 A.2d 179 (1975), *cert. denied*, 425 U.S. 976, 96 S.Ct. 2178, 48 L.Ed.2d 801 (1976); Herd v. State, 37 Md. App. 362, 377 A.2d 574 (1977); *Comment*, 22 Am. Univ. L. Rev. 619 (1973).

the meaning of Art. 31B, § 5, of the Code as it then read. The court ordered that Mr. Sutton be

> "committed to Patuxent Institution for confinement as a defective delinquent for an indeterminate period, without either maximum or minimum limits, and the balance of his sentence is hereby suspended and the defendant shall remain in the custody of Patuxent Institution subject to the provisions of Article 31B of the Annotated Code of Maryland."

B.

Both when Sutton's offenses occurred in 1974, and when he was committed to the Patuxent Institution in 1975, commitments to Patuxent were, as the above-quoted order indicates, for indeterminate periods without maximum or minimum limits and without regard for the length of the sentences initially imposed upon the criminal convictions. A defendant, found to be a defective delinquent and committed to Patuxent, was "no longer . . . confined for any portion of said original sentence." Code (1957, 1971 Repl. Vol.), Art. 31B, § 9.[3] For example, a person might be

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[3] Art. 31B, § 9(b), stated as follows:

> "(b) *When defendant found to be a defective delinquent* - If the court or the jury, as the case may be, shall find and determine that the said defendant is a defective delinquent, the court shall so inform the defendant, and shall order him to be committed or returned to the institution for confinement as a defective delinquent, for an indeterminate period without either maximum or minimum limits. In such event, the sentence for the original criminal conviction, or any unexpired portion thereof, shall be and remain suspended, and the defendant shall no longer be confined for any portion of said original sentence, except as otherwise provided herein. Instead, the defendant shall thenceforth remain in the custody of the institution for defective delinquents, subject to the provisions of this article."

sentenced to a ten year term of imprisonment for a particular offense, but, if he were thereafter committed to Patuxent Institution, he might remain confined for more than ten years and, possibly, for the rest of his life.

On the other hand, the Institutional Board of Review of the Patuxent Institution could parole at any time an inmate serving the indeterminate sentence if the Board found that parole was for the inmate's benefit and the benefit of society. Code (1975, 1971 Repl. Vol., 1975 Cum. Supp.), Art. 31B, § 13(d).[4] There was no requirement that the Board's decision in favor of parole be approved by any other person or entity.

In 1974 and 1975, an inmate not committed to Patuxent Institution and serving a life sentence at one of the institutions under the control of the Division of Correction was subject to an entirely different procedure with regard to parole. Such person serving a life sentence was not eligible "for parole consideration until he shall have served fifteen years or the equal of fifteen years when considering the allowances for diminution of period of confinement provided for in Article 27, § 700 and Article 27, §638C. . . ." Code (1957, 1978 Repl. Vol.), Art. 41, § 122(b).

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[4] Art. 31B, § 13(d), in 1974 and 1975, provided in pertinent part as follows:

> "If the institutional board of review as a result of its review and reexamination of any person believes that it may be for his benefit and for the benefit of society to grant him a . . . parole from the institution for defective delinquents, it may proceed to arrange for such . . . parole. . . . The board may attach to any such . . . parole such conditions as to it seem wise or necessary. . . . "

The Institutional Board of Review consisted of the Director of the Patuxent Institution, the three associate directors, a University of Maryland Law School professor, a member of the Maryland Bar, and a sociologist who was required to be a faculty member of a Maryland institution of higher education. Code (1957, 1971 Repl. Vol., 1975 Cum. Supp.), Art. 31B, § 12.

The initial decision with respect to his parole was made by the Maryland Board of Parole which, in 1976, was renamed the Maryland Parole Commission. Code (1957, 1978 Repl. Vol.), Art. 41, §§ 108, 110, 115. When an inmate was serving a life sentence, his parole not only had to be authorized by the Board of Parole but also was required to be approved by the Governor. Code (1957, 1978 Repl. Vol.), Art. 41, § 122(b). These provisions concerning the parole of persons committed to the Division of Correction and serving life sentences, including the requirement of gubernatorial approval, are substantially the same today. *See* Code (1957, 1986 Repl. Vol., 1989 Cum. Supp.), Art. 41, §§ 4-504, 4-516.[5]

Article 31B of the Code, relating to Patuxent Institution, was entirely re-written by Ch. 678 of the Acts of 1977. Judge Orth for the Court in *Watson v. State*, 286 Md. 291, 298-299, 407 A.2d 324 (1979), explained the reasons for the changes as follows:

> "Complaints [about Art. 31B], however, did develop, and criticism intensified as the years passed. Dissatisfaction was not with the objectives of the law but with their fulfillment. . . . [M]any persons found serious fault with the dictate that the defective delinquent was to be confined 'for an indeterminate period without either maximum or minimum limits,' and that '[i]n such event, the sentence for the original criminal conviction, or any unexpired portion thereof, shall be and remain suspended,' so that the defective delinquent would remain in the custody of Patuxent Institution. § 9(b). Thus, it was not unu-

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[5] The principal difference between the law in 1974-1975, and the law today, concerning the parole eligibility of prisoners serving life sentences, is that today certain categories of these prisoners must serve more than fifteen years to be eligible for parole. Art. 41, §§ 4-516(b)(2) and 4-516(b)(3).

> sual for a person to remain in confinement long after his original sentence had expired.
>
> "The mounting criticisms ultimately spurred legislative action. The Defective Delinquent Law was repealed by Acts 1977, ch. 678, effective 1 July 1977. The entire concept of the former law was not entirely abandoned, however. A new Article 31B was enacted, entitled 'Patuxent Institution.' The institution was retained 'to provide efficient and adequate programs and service for the treatment and rehabilitation of eligible persons.' § 2. ' "Eligible person" means a person who (1) has been convicted of a crime and is serving a sentence of imprisonment with at least three years remaining on it, (2) has an intellectual deficiency or emotional imbalance, (3) is likely to respond favorably to the programs and services provided at Patuxent Institution, and (4) can be better rehabilitated through those programs and services than by other incarceration.' § 1(g)."

Probably the most significant change brought about by the 1977 re-writing of Art. 31B was the abolition of the indeterminate sentence concept. Under Code (1957, 1976 Repl. Vol., 1978 Cum. Supp.), Art. 31B, § 11(a), as enacted by Ch. 678 of the Acts of 1977, "[a] person confined at the [Patuxent] Institution shall be released upon expiration of his sentence in the same manner and subject to the same conditions as if he were being released from a correctional facility."

One aspect of the pre-1977 law concerning Patuxent Institution was not substantially changed by Ch. 678 of the Acts of 1977. The Institutional Board of Review of Patuxent Institution retained the exclusive authority to parole a Patuxent inmate, including one serving a life sentence. There was no requirement that the Board's decision

to parole a Patuxent inmate serving a life sentence be approved by the Governor or by anyone else.[6]

Ch. 678 of the Acts of 1977, as amended in the course of its progress through the General Assembly, was expressly made retroactive to apply to one in Mr. Sutton's position. By operation of the statute, Mr. Sutton's original life and twelve year sentences were "reimposed." He was, however, retained at Patuxent Institution. *See* Code (1957, 1976 Repl. Vol., 1978 Cum. Supp.), Art. 31B, § 16(b).[7] The

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[6] Code (1957, 1976 Repl. Vol., 1978 Cum. Supp.), Art. 31B, § 11(b)(2), provided in pertinent part as follows:

> "If the board of review concludes that (1) it will not impose an unreasonable risk on society and (2) it will assist in the treatment and rehabilitation of the eligible person, it shall grant a parole from the Institution. . . ."

[7] The bill which became Ch. 678, as introduced in the General Assembly, contained a proposed § 16 of Art. 31B which stated that the enactment was "prospective only," that the new statute should apply only to those committed to Patuxent Institution after July 1, 1977, and that former Art. 31B should remain in effect with respect to those committed to Patuxent Institution on or before June 30, 1977. This proposed § 16 was deleted by amendment, and an entirely different § 16 was inserted in its place. Art. 31B, § 16(b), as enacted, provided as follows:

> "(b)(1) Each person committed to the Institution prior to July 1, 1977, shall, within 90 days after July 1, 1977, have the original sentence that was suspended upon his commitment to the Institution reimposed as of the time it was originally entered, with credit for time spent at the Institution.
>
> (2) Each such person shall be released when the reimposed sentence has expired.
>
> (3) Each person whose reimposed sentence has not expired upon its reimposition shall be reevaluated by January 1, 1978, and dealt with in accordance with the provisions of this article, except that such a person may be retained at the Institution notwithstanding that he has less than three years remaining to serve on the reimposed sentence. Any person transferred to the Division of Correction after reevaluation who is eligible for parole

1977 change in Mr. Sutton's sentence, from an indeterminate sentence to the reimposition of sentences of life imprisonment plus twelve years, by itself probably had little or no effect upon his prospects for parole. The reason for this, as pointed out previously, is that the 1977 statute made no substantial change in the requirements for parole from the Patuxent Institution, regardless of whether the sentence was for life or was indeterminate.

The requirements for parole from Patuxent Institution were, however, changed by Ch. 588 of the Acts of 1982. This statute added a sentence to Art. 31B, § 11(b)(2), relating to paroles by the Institutional Board of Review of Patuxent Institution, stating as follows: "An eligible person who is serving a term of life imprisonment shall only be paroled with the approval of the Governor." Similar language was also added to what is now Art. 41, § 4-516(b)(4).[8]

Unlike Ch. 678 of the Acts of 1977, Ch. 588 of the Acts of 1982 contained no express language concerning the statute's applicability to persons who were confined at Patuxent Institution prior to July 1, 1982, which was the effective date of Ch. 588. The legislative history of Ch. 588, contained in the file of the Department of Legislative Reference, is also silent on this question. Patuxent Institution and the Governor have apparently administered the statute as if it were applicable to persons whose Patuxent

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consideration by the Maryland Parole Commission upon the date of transfer shall have a hearing in accordance with Article 41, § 110 within 90 days after the transfer."

[8] Code (1957, 1986 Repl. Vol., 1989 Cum. Supp.), Art. 41, § 4-516(b)(4) states:

> "If eligible for parole under this subsection, an inmate serving a term of life imprisonment and a person serving a term of life imprisonment who is confined at Patuxent Institution as an eligible person shall only be paroled with the approval of the Governor."

confinement began prior to July 1, 1982. In the instant case, both sides and the circuit court have proceeded upon the assumption that Ch. 588 was intended by the General Assembly to apply to Mr. Sutton and others whose Patuxent confinement pre-dated the statute. Under this assumption, the combined effect of the 1977 statutory change, reimposing a life sentence upon Mr. Sutton, and the 1982 change, requiring gubernatorial approval for parole of Patuxent inmates serving life sentences, obviously affected Mr. Sutton's prospects for parole. This was confirmed by subsequent events.

C.

On October 4, 1984, the Institutional Board of Review voted in favor of paroling Richard Lee Sutton. The Board's determination and supporting documents were forwarded to the Governor in early 1985. On September 4, 1985, however, the Governor refused to approve the parole. Again on June 5, 1986, the Institutional Board of Review voted to parole Mr. Sutton, and again the Governor refused to approve the parole.

Mr. Sutton, on November 6, 1987, filed in the Circuit Court for Howard County a petition for a writ of habeas corpus, naming as defendant Dr. Norma Gluckstern, then the Director of Patuxent Institution and the Chairman of the Institutional Board of Review. Mr. Sutton requested that the circuit court order his release on parole in accordance with the decisions of the Institutional Board of Review. He contended that the requirement of gubernatorial approval of the parole, as applied to him, violated the ex post facto clauses of the Maryland Declaration of Rights and of the United States Constitution.

Dr. Gluckstern, on November 8, 1987, represented by the State's Attorney for Baltimore County, answered the petition and filed a motion to transfer the case to the Circuit Court for Baltimore County pursuant to Code (1974,

1989 Repl. Vol.), § 3-702(b) of the Courts and Judicial Proceedings Article, and Maryland Rule Z54.[9] A few days later a judge of the Circuit Court for Howard County signed an order transferring the habeas corpus case to the Circuit Court for Baltimore County.

The Circuit Court for Baltimore County (DeWaters, J.) held a hearing on December 7, 1987. The court filed an opinion and order on January 22, 1988, and an amended opinion and order on January 27, 1988. The amended opinion held that the retroactive requirement of gubernatorial approval "is to the disadvantage of the Petitioner because it creates an additional step which was not required before." The circuit court concluded that, as applied to Mr. Sutton, the requirement of gubernatorial approval violated the ex post facto clauses of the Maryland Declaration of Rights and of the United States Constitution. The court's order, entered on January 27, 1988, "ORDERED that Richard Lee Sutton be released for parole" in accordance with the decision of the Institutional Board of Review in October 1984.

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[9] The pertinent portion of § 3-702(b) and Rule Z54 are to the same effect. Rule Z54 provides as follows:

> "Rule Z54. Discretion to Refer Application to Another Court or Judge.
>
> "A judge to whom an application for the writ has been made may, in his discretion, refer the application to any court in the judicial circuit in which the person confined was convicted, without taking other action thereon, provided, however, that such an application shall not be referred to any judge who sat at the trial at which the person was convicted, except with the written consent of the applicant or the person confined. A court to which an application for the writ has been referred shall act thereupon forthwith, and shall have no power to further refer or transfer the application. In exercising the discretion granted by this Rule, the judge to whom an application for the writ has been made shall consider the interests and convenience of all parties concerned including the State."

On the following day, in the course of an unrecorded oral conversation among Judge DeWaters, counsel for Mr. Sutton, and an assistant state's attorney who had been representing Dr. Gluckstern, Judge DeWaters apparently suggested to the assistant state's attorney that he contact someone in the Maryland Attorney General's Office and have the Attorney General's Office file a memorandum of law in the case. There is neither a docket entry nor any other writing in the record reflecting this conversation. Our knowledge of it comes from an affidavit filed in this Court by the assistant state's attorney. Counsel for Mr. Sutton does not dispute that the conversation took place.

On February 16, 1988, an assistant attorney general, representing Dr. Gluckstern, filed in the Circuit Court for Baltimore County a memorandum of law arguing that the application to Mr. Sutton of the gubernatorial approval requirement did not violate the ex post facto clauses of the state and federal constitutions. Mr. Sutton filed a memorandum in response.

On March 31, 1988, the circuit court amended its January 27th opinion, and on July 13, 1988, the court amended its January 27th order. Nevertheless the amended opinion and order continued to reflect the circuit court's view that the requirement of gubernatorial approval could not be applied to Mr. Sutton under the ex post facto clauses of the state and federal constitutions. The amended order, filed on July 14, 1988, required the Institutional Board of Review to afford Mr. Sutton another parole hearing and to proceed "solely on the facts and evidence as they existed when the Institutional Board of Review originally considered Petitioner for parole in October of 1984." The order further stated that "[s]hould the Board elect to grant parole to petitioner, such parole shall not be subject to the approval of the Governor of Maryland as provided in Article 31B. . . ." The amended order continued in pertinent part as follows:

"3. Should the Institutional Board of Review of the Patuxent Institution grant parole to the Petitioner, the Patuxent Institution is free to seek revocation of such parole by the Institutional Board of Review on the basis of any actions or conduct on the part of the Petitioner occurring after October of 1984.

"4. If the Patuxent Institution requests revocation of any such parole of the Petitioner, the Institutional Board of Review shall conduct a hearing on such request in accordance with the provisions of Article 31B of the Code. This Court specifically does not order the release from custody of the Petitioner unless [application for] revocation of parole is not filed immediately after the said parole hearing. . . ."

Dr. Gluckstern filed a notice of appeal within thirty days of the July 14, 1988, order. Mr. Sutton did not file a cross-appeal. He did, however, file in the Court of Special Appeals a motion to dismiss Dr. Gluckstern's appeal on the ground that an order of this nature in a habeas corpus case is not appealable. The Court of Special Appeals, agreeing with Mr. Sutton, dismissed the appeal.

Dr. Gluckstern then filed a petition for a writ of certiorari which we granted. In addition, we granted a stay of the circuit court's order until our decision in the case.

D.

In this Court, Mr. Sutton initially argues that Dr. Gluckstern's notice of appeal to the Court of Special Appeals was untimely. Next, he argues that no appeal lies from the circuit court's order. Finally, Mr. Sutton contends that, if it is held that the notice of appeal was timely and that the order is appealable, the circuit court's judgment should be affirmed. Dr. Gluckstern maintains that the notice of

appeal was timely, that the order was appealable, and that the order should be reversed because the requirement of gubernatorial approval for parole may validly be applied to Mr. Sutton. In addition to these three issues, at oral argument before this Court a fourth issue was raised and discussed by the parties. That was whether the relief granted by the circuit court, namely the ordering of another parole hearing instead of the release of Mr. Sutton, was obtainable in a habeas corpus proceeding.

Except as set forth above, neither side in this Court complains about the nature of the circuit court's order or about any of its specific provisions. Consequently, except as hereafter discussed, no issues concerning the propriety of the relief granted or concerning any specific provisions of the order are before us.

II.

Mr. Sutton contends that the amended circuit court order entered on January 27, 1988, was the final judgment in the case, and that there was no stay or any other action taken pursuant to the rules which operated to deprive the January 27th order of finality. Since Dr. Gluckstern's notice of appeal was not filed until more than 30 days after the January 27th order, Mr. Sutton argues that the notice of appeal was untimely. *See* Rule 8-202(a).[10]

Dr. Gluckstern counters with two alternate arguments. *First*, she maintains that a motion under Rule 2-534 to alter or amend a judgment, filed within ten days of the

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[10] Rule 8-202(a) provides in pertinent part as follows:

> "Except as otherwise provided in this Rule or by law, the notice of appeal shall be filed within 30 days after entry of the judgment or order from which the appeal is taken."

judgment, may be made by the trial judge sua sponte.[11] Dr. Gluckstern claims that Judge DeWaters's oral suggestion the day after entry of judgment, that the Attorney General's Office file a memorandum of law, constituted a motion under Rule 2-534. Therefore, under Rule 8-202(c), a notice of appeal need not be filed until 30 days after the disposition of the Rule 2-534 motion.[12] The disposition of the Rule 2-534 motion, according to Dr. Gluckstern, was not until July 14, 1988, and the notice of appeal was filed within 30 days of that date.

Second, Dr. Gluckstern argues that the memorandum of law filed by the Attorney General's Office on February

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[11] Rule 2-534 states:

> "Rule 2-534. MOTION TO ALTER OR AMEND A JUDGMENT - COURT DECISION
>
> "In an action decided by the court, on motion of any party filed within ten days after entry of judgment, the court may open the judgment to receive additional evidence, may amend its findings or its statement of reasons for the decision, may set forth additional findings or reasons, may enter new findings or new reasons, may amend the judgment, or may enter a new judgment. A motion to alter or amend a judgment may be joined with a motion for new trial."

[12] Rule 8-202(c) provides as follows:

> "(c) Civil Action - Post Judgment Motions. - In a civil action, when a timely motion is filed pursuant to Rule 2-532, 2-533, or 2-534, the notice of appeal shall be filed within 30 days after entry of (1) a notice of withdrawing the motion or (2) an order denying a motion pursuant to Rule 2-533 or disposing of a motion pursuant to Rule 2-532 or 2-534. A notice of appeal filed before the withdrawal or disposition of any of these motions does not deprive the trial court of jurisdiction to dispose of the motion."

See B & K Rentals v. Universal Leaf Tobacco, 319 Md. 127, 131-132, 571 A.2d 1213 (1990); Yarema v. Exxon Corp., 305 Md. 219, 241, 503 A.2d 239 (1986); Unnamed Atty. v. Attorney Griev. Comm'n, 303 Md. 473, 486, 494 A.2d 940 (1985); Sieck v. Sieck, 66 Md. App. 37, 42-44, 502 A.2d 528 (1986).

16, 1988, which was within 30 days of the judgment, constituted a timely motion under Rule 2-535(a) to revise the judgment.[13] Dr. Gluckstern recognizes that a motion filed more than ten days after a judgment but within 30 days of the judgment, under Rule 2-535(a), ordinarily does not affect the finality of the judgment or the time for appeal. She points out, however, that where a timely motion under Rule 2-535(a) is filed, where there is no notice of appeal filed with 30 days of the judgment, and where the circuit court in fact does revise the judgment, the revised judgment becomes the final judgment in the case. Under this argument also, the revised order filed on July 14, 1988, was the final judgment in the case.

The first theory set forth by Dr. Gluckstern must be rejected. We do agree that the circuit court may sua sponte file a Rule 2-534 motion to alter or amend its judgment. *See Yarema v. Exxon Corp.*, 305 Md. 219, 241, 503 A.2d 239 (1986). *See also Goins v. State*, 293 Md. 97, 111, 442 A.2d 550 (1982); *Scott v. State*, 223 Md. 376, 381, 164 A.2d 716 (1960). Nevertheless, we do not agree that the circuit court's oral statement to counsel on January 28, 1988, was sufficient to constitute a sua sponte motion to alter or amend the judgment. There was nothing in writing and nothing entered on the docket. As we stated in *Brown v. Baer*, 291 Md. 377, 385, 435 A.2d 96 (1981), with regard to a trial judge's alleged oral statement made within 30 days of a final judgment and staying the judgment, "anything other than a *written* extension order or a docket entry prior to the expiration of the thirty-day period is

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[13] Rule 2-535(a) provides as follows:

"Rule 2-535. REVISORY POWER

"(a) Generally. On motion of any party filed within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2-534."

ineffective. . . ." It is important that parties, appellate courts, and others who are interested, be able to determine from the record, with some degree of certainty, whether or not an order constitutes a final judgment. It would be inconsistent with this principle to hold that an oral statement by a trial judge, not reflected in any written order or docket entry, constitutes a motion under Rule 2-534 and thus deprives a judgment of its finality.

On the other hand, we agree with Dr. Gluckstern that the written memorandum filed on February 16, 1988, was a motion under Rule 2-535(a) to revise the judgment of January 27, 1988. While not labeled a motion to revise the judgment, the substance of the memorandum was clearly a request by the defendant to revise the order requiring the release of Mr. Sutton. It was treated as such by the circuit court and the parties. No one was misled by the caption.

As Dr. Gluckstern filed a timely motion to revise the judgment in accordance with Rule 2-535(a), as there was no timely notice of appeal prior to revision of the judgment, and as the judgment was in fact revised on July 14, 1988, the order entered on July 14, 1988, became the final judgment. The controlling principles were set forth in *Yarema v. Exxon Corp.*, *supra*, 305 Md. at 240-241, 503 A.2d at 250, as follows:

> "Rule 2-535(a), formerly numbered Rule 625a, authorizes the circuit court to exercise revisory power over a judgment on a motion filed within thirty days from the judgment. Nevertheless, it is settled that neither the timely filing of a motion to revise a final judgment nor the court's denial of such motion, absent an order staying the operation of the judgment, affects the finality of the judgment or the running of the time for appeal. *Unnamed Atty. v. Attorney Griev. Comm'n*, 303 Md. 473, 484, 494 A.2d 940 (1985);

> *Hardy v. Metts*, 282 Md. 1, 5, 381 A.2d 683 (1978); *Hanley v. Stulman*, 216 Md. 461, 467, 141 A.2d 167 (1958). But when a motion under Rule 2-535(a) to revise a final judgment is filed within thirty days and the circuit court in fact revises the judgment, and there has been no intervening order of appeal, the prior judgment loses its finality and the revised judgment becomes the effective final judgment in the case. *Unnamed Atty. v. Attorney Griev. Comm'n*, *supra*, 303 Md. at 484, 494 A.2d 940; *Brown v. Baer*, 291 Md. 377, 387, 435 A.2d 96 (1981)."

Moreover, under circumstances like those in this case, as long as the motion to revise the judgment is filed within 30 days, the revised judgment need not be entered within 30 days of the original judgment. *Brown v. Baer*, *supra*, 291 Md. at 387, 435 A.2d at 101.

Consequently, Dr. Gluckstern's notice of appeal, filed within 30 days of the revised judgment, was timely.

III.

This Court has consistently held that statutory provisions like Code (1974, 1989 Repl. Vol.), § 12-301 of the Courts and Judicial Proceedings Article, generally authorizing an "appeal from a final judgment entered in a civil or criminal case," do not apply to habeas corpus cases. An appeal may be taken from a final order in a habeas corpus case only where specifically authorized by statute. *See, e.g.*, *Superintendent v. Calman*, 203 Md. 414, 423-425, 101 A.2d 207 (1953); *Petition of Otho Jones*, 179 Md. 240, 242-243, 16 A.2d 901 (1940); *Annapolis v. Howard*, 80 Md. 244, 245-246, 30 A. 910 (1894); *State v. Glenn*, 54 Md. 572, 593-595 (1880); *Coston v. Coston*, 25 Md. 500, 505-509 (1866); *Bell v. The State*, 4 Gill. 301, 304 (1846).

Two statutes authorize appeals, or applications for leave to appeal, in particular classes of habeas corpus cases.

Code (1957, 1986 Repl. Vol.), Art. 41, § 2-210, authorizes an appeal under certain conditions from the denial of a habeas corpus application in an extradition case. Code (1974, 1989 Repl. Vol.), § 3-707 of the Courts and Judicial Proceedings Article, provides for applications for leave to appeal from the denial of relief in habeas corpus cases regarding the right to bail or allegedly excessive bail.[14]

There are two other statutes which relate to the right to appeal in habeas corpus cases. They are § 3-706 of the Courts and Judicial Proceedings Article and § 645A(e) of the Post Conviction Procedure Act, Code (1957, 1987 Repl. Vol., 1989 Cum. Supp.), Art. 27, § 645A(e). In arguing that she is entitled to appeal in the present case, Dr. Gluckstern relies upon § 3-706 of the Courts and Judicial Proceedings Article. In our view, however, the Court of Special Appeals correctly held that the appeal in this case is not authorized by § 3-706. On the other hand, we hold that the appeal was authorized by § 645A(e).

A.

Section 3-706 of the Courts and Judicial Proceedings Article provides as follows:

> "(a) *Memorandum to be filed after discharge.* - If a person is released or discharged by a judge under the writ of habeas corpus on the ground that the law under which the person was convicted is unconstitutional, in whole or in part, the

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[14] Section 3-707 of the Courts and Judicial Proceedings Article was originally enacted by Ch. 392 of the Acts of 1972. The statute was obviously intended to overturn the holding in *Hudson v. Superintendent*, 11 Md.App. 253, 273 A.2d 470 (1971), that there was no right to appeal the denial of a habeas corpus application in regard to bail. *See Washburn v. Sheriff*, 16 Md. App. 611, 298 A.2d 462 (1973); *Long v. State*, 16 Md. App. 371, 297 A.2d 299 (1972); *Lewis v. Warden*, 16 Md. App. 339, 296 A.2d 428 (1972); *Bigley and Fleming v. Warden*, 16 Md. App. 1, 294 A.2d 141 (1972).

> judge shall file a memorandum within five days after the release or discharge and transmit it with original papers in the case to the clerk of the Court of Special Appeals.
>
> "(b) *Opinion of Court of Special Appeals.* - (1) The Court of Special Appeals shall consider the memorandum and the original papers at the earliest feasible time and render its opinion.
>
> "(2) The opinion has the same effect as an opinion filed in a case formally heard and determined by the court on an appeal."

As shown by the above-quoted language, the appeal under § 3-706 is an automatic one. It is not necessary that a party file a timely notice of appeal.[15] Moreover, under the plain language of § 3-706, there is an appeal under the statute only when a person is released or discharged "on the ground that the law under which the person was convicted is unconstitutional." Judge DeWaters in the case at bar took the position that § 3-706 was inapplicable because the laws under which Mr. Sutton was convicted (*i.e.*, the laws proscribing murder and use of a handgun in the commission of a felony or crime of violence) were not held unconstitutional. Thus, after the July 14, 1988, order, the original papers were not automatically sent to the Court of Special Appeals in accordance with § 3-706.

What is now § 3-706 was originally enacted in substantially the same language by Ch. 6 of the Acts of 1880.[16] Ch 6, in pertinent part, provided for an automatic appeal to the Court of Appeals

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[15] If § 3-706 were applicable to this case, the discussion in Part II of this opinion would, of course, be wholly unnecessary.

[16] Another portion of Ch. 6 of the Acts of 1880 attempted to restrict the territorial jurisdiction of judges in habeas corpus cases, but that portion was held to be unconstitutional and severable in State v. Glenn, 54 Md. 572, 595-599 (1880).

> "[w]henever any Court . . . or . . . judge . . . shall release or discharge any person . . . under the writ of 'Habeas Corpus,' charged with the violation of . . . any act of Assembly of this State, . . . upon the ground . . . that such act . . . is unconstitutional and void, in whole or in part, because contrary to the Constitution . . . of this State, or . . . of the United States. . . . "

As pointed out by Judge Alvey for the Court in the first case to arise under Ch. 6, *State v. Glenn*, *supra*, 54 Md. at 594, the automatic appeal is authorized by the statute in a very limited situation, with "the Court or Judge being required to transmit the papers to this Court only in the event of the discharge of the prisoner for the reasons stated." The "reasons stated" were the unconstitutionality of the statute which the prisoner had been charged with violating. In *Glenn*, where the automatic appeal was permitted, the prisoner had been charged under and convicted of violating a statute proscribing disorderly conduct and granting jurisdiction to a justice of the peace, without a jury, to try the charge. A circuit judge, in the habeas corpus proceeding, had ordered the prisoner's release on the ground that the statute under which the prisoner was convicted was unconstitutional under the jury trial clauses of the Maryland Declaration of Rights.

In *Price v. Clawns*, 180 Md. 532, 533, 25 A.2d 672 (1942), Judge Sloan for this Court pointed out that the habeas corpus appeal under Ch. 6 of the Acts of 1880 could be entertained "because the applicant had been convicted and sentenced to the Baltimore City Jail under a statute which in the opinion of the judge hearing the application is void and unconstitutional." *See also Quenstedt v. Wilson*, 173 Md. 11, 14-16, 194 A. 354 (1937); *Day v. Sheriff*, 162 Md. 221, 222-223, 159 A. 602 (1932); *Dougherty v. Superintendent*, 144 Md. 204, 205-206, 124 A. 870 (1923); *Beall v. State*, 131 Md. 669, 670-672, 103 A. 99

(1917). Where habeas corpus appeals were claimed to be authorized by Ch. 6 of the Acts of 1880 and the specific conditions of the statute were not met, this Court has dismissed the appeals. *See, e.g., State v. Musgrove*, 241 Md. 521, 528-529, 217 A.2d 247 (1966); *Petition of Otho Jones, supra*, 179 Md. at 242-243, 16 A.2d at 901-902. *See also Annapolis v. Howard, supra*, 80 Md. at 246, 30 A. at 911; *Superintendent v. Zeserman*, 46 Md. App. 426, 427-429, 418 A.2d 1220 (1980); *State v. Layman*, 28 Md. App. 332, 336-337, 345 A.2d 444 (1975).

Under the clear language of Ch. 6 of the Acts of 1880, now § 3-706 of the Courts and Judicial Proceedings Article, and the cases in this Court, there is an automatic appeal only where a prisoner's release is "on the ground that the law under which the person was convicted is unconstitutional." The laws under which Mr. Sutton was convicted were the common law and statutory provisions proscribing murder[17] and the statute creating the offense of using a handgun in the commission of a felony or crime of violence.[18] Giving the phrase "law under which a person was convicted" its broadest meaning, the category of laws under which Mr. Sutton was convicted might be expanded to include former Code (1957, 1971 Repl. Vol.), Art. 31B, §§ 6-9, providing for the incarceration and examination of a person at the Patuxent Institution to determine if he was a defective delinquent, and providing for the commitment to Patuxent of defective delinquents.[19] None of

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[17] Code (1957, 1987 Repl. Vol.), Art. 27, §§ 407-412.

[18] Art. 27, § 36B(d).

[19] This broad reading of what is now § 3-706 of the Courts and Judicial Proceedings Article is supported by Director v. Cash, 269 Md. 331, 351-352, 305 A.2d 833 (1973), *cert. denied*, 414 U.S. 1136, 94 S.Ct. 881, 38 L.Ed.2d 762 (1974). In *Cash*, the prisoners were incarcerated at Patuxent Institution pursuant to Art. 31B, §§ 6 and 7, which provided for incarceration and examination of persons at Patuxent to determine if they were defective delinquents. The circuit judge in *Cash*

these provisions was held to be unconstitutional by Judge DeWaters. His constitutional ruling did not relate to any provision of law which led to Mr. Sutton's incarceration at Patuxent Institution in 1974 and 1975. To hold that this appeal is authorized by § 3-706 would be to emasculate the language of the statute.

B.

We now consider whether the appeal was authorized by Art. 27, § 645A(e).

The General Assembly, by Ch. 702 of the Acts of 1945 and Ch. 625 of the Acts of 1947, created a relatively broad right to file an application for leave to appeal in habeas corpus cases. Those enactments, as amended by Chs. 399 and 760 of the Acts of 1957, were codified as Code (1957), Art. 42, §§ 6 and 7, which provided as follows:

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held that a portion of Art. 31B, § 6, was unconstitutional. Although Art. 31B, § 6, was not the law under which the prisoners were "convicted" in a literal sense, it was the law which created or gave rise to the incarceration at Patuxent which was the subject of the habeas corpus proceeding. The *Cash* decision was consistent with the language of the Post Conviction Procedure Act at that time. One could bring an action under the Post Conviction Procedure Act if his incarceration resulted either from a conviction in the traditional sense or from a proceeding under then Article 31B. *See* Code (1957, 1971 Repl. Vol.), Art. 27, § 645A(a). *Compare*, however, McElroy v. Director, 211 Md. 385, 390-392, 127 A.2d 380 (1956), *cert. denied*, 353 U.S. 903, 77 S.Ct. 673, 1 L.Ed.2d 660 (1957).

A somewhat similar broad reading, without any discussion, had been given to Ch. 6 of the Acts of 182 in Wright v. Herzog, 182 Md. 316, 34 A.2d 460 (1943), where the habeas corpus applicant had been incarcerated for violating a conditional pardon, and the circuit judge held that the conditional pardon statute was unconstitutional.

Whether the *Cash* and *Herzog* holdings concerning appealability were correct, in light of the statutory language, is a matter which we need not decide in this case. Even if correct, those cases do not support the argument that the appeal in the present case was authorized by § 3-706.

"§ 6. Appeal.

Any person, including the Attorney General or the State's attorney for Baltimore City or a county, as the case may be, aggrieved by the order of the judge in refusing to issue a writ of habeas corpus, or in discharging or remanding the person seeking said writ, may apply to the Court of Appeals of Maryland for leave to prosecute an appeal therefrom. Said application for leave to prosecute an appeal shall be in such form as the Court of Appeals may, by its rules, prescribe, and in the event that the Attorney General or the State's attorney shall forthwith state his intention to file such application for an appeal, the order discharging the prisoner may be stayed, but the judge may, in his discretion, admit the petitioner to bail for his appearance when required. If the application to prosecute such appeal shall be granted, the procedure thereafter shall be in conformity with the rules of the Court of Appeals. If said application is denied, the order sought to be reviewed shall thereby become final to the same extent and with the same effect as if said order had been affirmed upon appeal."

"§ 7. Cases when §§ 4 to 6 inapplicable.

The provisions of §§ 4, 5 and 6 shall not apply to any case unless the petitioner is detained for or confined as the result of a prosecution for a criminal offense or has been confined as a defective delinquent under the provisions of Article 31B of the Code, title 'Defective Delinquents.' "[20]

Under these provisions, whenever a habeas corpus petitioner was detained or confined as a result of a crim-

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[20] The final clause, relating to confinement under Art. 31B, was added by Ch. 760 of the Acts of 1957, and was intended to overturn the holding in McElroy v. Director, *supra*, 211 Md. at 390-392, 127 A.2d at 383-384.

inal conviction or a defective delinquency proceeding, an application for leave to appeal from the order in the habeas corpus case could be filed by the aggrieved party. Under Art. 42, §§ 6 and 7, the order in the habeas corpus case was subject to an application for leave to appeal regardless of which side prevailed, regardless of whether the issue was a constitutional one, and regardless of whether the challenge was to the original conviction and sentence or was to a later matter.

In 1958 the General Assembly enacted the Post Conviction Procedure Act, Ch. 44 of the Acts of 1958, Code (1957, 1963 Cum. Supp.), Art. 27, § 645A *et seq.* That enactment, for the first time, created a statutory remedy under which a prisoner could collaterally challenge the conviction and sentence, or defective delinquency determination, which led to his incarceration. The Post Conviction Procedure Act also provided that any party aggrieved by the final trial court order in a proceeding under that Act could file an application for leave to appeal. Code (1957, 1963 Cum. Supp.), Art. 27, § 645-I. The purpose of the Post Conviction Procedure Act was to create a simple statutory procedure, in place of the common law habeas corpus and coram nobis remedies, for collateral attacks upon criminal convictions and sentences. *Brady v. State*, 222 Md. 442, 446-447, 160 A.2d 912 (1960); *State v. D'Onofrio*, 221 Md. 20, 28-29, 155 A.2d 643 (1959). Although for constitutional reasons the General Assembly did not restrict the authority of judges to issue writs of habeas corpus,[21] it did in the Post Conviction Procedure Act legislate with regard to appeals in habeas corpus cases.

Ch. 45 of the Acts of 1958 repealed Art. 42, § 6, which had broadly provided for applications for leave to appeal in habeas corpus cases. In addition, Ch. 44 of the Acts of 1958, which enacted the Post Conviction Procedure Act,

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[21] *See* n. 16, *supra*; State v. Glenn, *supra*; Art. IV, § 6, of the Maryland Constitution.

stated in pertinent part as follows (Code (1957, 1963 Cum. Supp.), Art. 27, § 645A(b)):

> "Hereafter no appeals to the Court of Appeals of Maryland in habeas corpus or coram nobis cases, or from other common law or statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment shall be permitted or entertained, except appeals in such cases pending in the Court of Appeals on June 1, 1958, shall be processed in due course."

In light of the reference in the above-quoted language to "the validity of incarceration under sentence of death or imprisonment," and in light of the legislative purpose of substituting the statutory post conviction remedy for habeas corpus where the conviction and sentence leading to incarceration were being collaterally attacked, the language of § 645A(b) might arguably have been construed to abolish habeas corpus appeals only where the purpose of the habeas corpus proceeding was to challenge the original criminal conviction and sentence, or defective delinquency proceeding, which had led to the incarceration. Nevertheless, in dicta and without any discussion, this Court seemed to construe the 1958 enactment as abolishing all appeals in habeas corpus cases except those under Ch. 6 of the Acts of 1880 and those relating to extradition. *Cumberland v. Warden*, 225 Md. 636, 638, 171 A.2d 709 (1961), *cert. denied*, 369 U.S. 855, 82 S.Ct. 941, 8 L.Ed.2d 14 (1962) ("This Court may no longer entertain an appeal from the denial of a petition for a writ of habeas corpus. Article 27, Section 645A(b)"); *Brady v. State*, *supra*, 222 Md. at 447, 160 A.2d at 915-916 ("the P.C.P.A. . . . clearly took away the right of appeal from an order denying" habeas corpus relief). *See also Berman v. Warden*, 232 Md. 642, 644 n. 1, 193 A.2d 551 (1963).

The General Assembly in 1965 added new language to the portion of the Post Conviction Procedure Act relating to appeals in habeas corpus cases. Code (1957, 1987 Repl. Vol., 1989 Cum. Supp.), Art. 27, § 645A(e), as amended by Ch. 442 of the Acts of 1965, now reads in relevant part as follows (new 1965 language underscored):

> "No appeals to the Court of Appeals or the Court of Special Appeals in habeas corpus or coram nobis cases, or from other common-law or statutory remedies which have heretofore been available for challenging the validity of incarceration under sentence of death or imprisonment shall be permitted or entertained, except appeals in such cases pending in the Court of appeals on June 1, 1958, shall be processed in due course. *Provided, however, that nothing in this subtitle shall operate to bar an appeal to the Court of Special Appeals (1) in a habeas corpus proceeding instituted under § 2-210 of Article 41 of this Code or (2) in any other proceeding in which a writ of habeas corpus is sought for any purpose other than to challenge the legality of a conviction of a crime or sentence of death or imprisonment therefore including confinement as a result of a proceeding under Article 31B of this Code.*"

The only discussion of the 1965 language by this Court was in *State v. Musgrove, supra*, 241 Md. at 527-528, 217 A.2d at 249-250, where the Court held that no appeal was permitted in a habeas corpus case where the prisoner was challenging the examination procedures under Art. 31B which led to his incarceration at Patuxent Institution. Neither *Musgrove* nor any other opinion of this Court has discussed whether the language added to the Post Conviction Procedure Act in 1965 was intended to authorize appeals in habeas corpus cases which did *not* involve challenges to the judgments in criminal cases (*i.e.*. convictions and sentences imposed) or challenges to the examination and defective delinquency proceedings under Art. 31B.

Nevertheless, during the period after 1965 and before direct appellate jurisdiction in habeas corpus cases was shifted from this Court to the Court of Special Appeals,[22] this Court did entertain appeals in habeas corpus cases not involving extradition and not involving challenges to judgments in criminal cases or Art. 31B proceedings. *See, e.g., Whiteley v. Warden*, 258 Md. 634, 267 A.2d 150 (1970). Subsequently, however, the Court of Special Appeals, as it did in the present case, has dismissed appeals in this type of habeas corpus case.[23] The Court of Special Appeals' reasoning seems to be that the sole purpose of the 1965 language was to make it clear that appeals could be taken in cases involving extradition and cases under Ch. 6 of the Acts of 1880.

In our view, the language added to the Post Conviction Procedure Act in 1965 was intended to authorize appeals in habeas corpus cases such as the case at bar. The language of Art. 27, § 645A(e), emphasizes that the Post Conviction Procedure Act shall not operate to bar an appeal

> "(1) in a habeas corpus proceeding instituted under § 2-210 of Article 41 of this Code or (2) in any other proceeding in which a writ of habeas corpus is sought for any purpose other than to challenge the legality of a conviction of a crime or sentence of death or imprisonment therefor, including confinement as a result of a proceeding under Article 31B of this Code."

Clause (2) of the above-quoted language obviously applies to a case like the present one. Otherwise, the clause would be meaningless.

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[22] Ch. 99 of the Acts of 1970, effective July 1, 1970.

[23] Superintendent v. Zeserman, 46 Md. App. 426, 418 A.2d 1220 (1980); State v. Layman, 28 Md. App. 332, 345 A.2d 444 (1975); Hudson v. Superintendent, *supra*. *See* n.14, *supra*.

Immediately prior to the 1965 enactment, only two statutes provided for appeal or leave to appeal in habeas corpus proceedings: what is now Art. 41, § 2-210, relating to extradition cases, and Ch. 6 of the Acts of 1880, relating to orders based on the unconstitutionality of the statute under which the prisoner was convicted. Clause (1) of the 1965 language encompasses the extradition cases, and therefore, those cases are not the object of clause (2). Automatic appeals under Ch. 6 of the Acts of 1880 are also not the object of clause (2). Ch. 6 of the Acts of 1880 covers only constitutional challenges to criminal convictions and Art. 31B examination or defective delinquency proceedings. Clause (2) relates to appeals in cases "*other than*" those challenging criminal convictions or Art. 31B proceedings. Consequently, contrary to the view of the Court of Special Appeals, the purpose of clause (2) was not to make it clear that the Post Conviction Procedure Act did not abolish appeals in habeas corpus cases involving extradition and cases under Ch. 6 of the Acts of 1880. Neither category of cases was encompassed by clause (2). Clause (2) has meaning only if construed as granting a right of appeal in a habeas corpus case not involving a challenge to the criminal conviction and sentence or the Art. 31B proceeding which led to the prisoner's confinement.

Our interpretation of clause (2) is supported by the title of the 1965 bill which added the new language to the Post Conviction Procedure Act, and which was enacted as Ch. 442 of the Acts of 1965. The title of the bill states that one of its purposes was "to enumerate certain classes of habeas corpus cases in which an appeal to the Court of Appeals may be taken." This does not indicate simply a purpose of clarifying existing law. Where, however, other language in Ch. 442 was intended simply to clarify existing law, the corresponding portion of the title expressly stated "To clarify" etc.

Finally, our conclusion is consistent with the purpose of the Post Conviction Procedure Act. As previously discussed, the Act was designed to create a statutory remedy for collateral challenges to criminal judgments and Art. 31B examination and defective delinquency proceedings, and to substitute this remedy for habeas corpus and coram nobis actions challenging criminal judgments and Art. 31B proceedings. In situations where the Post Conviction Procedure Act did not provide a remedy, and thus was not a substitute for habeas corpus, the enactment of the new statute provided no reason for restricting appeals in habeas corpus cases.

The State's appeal in this case, therefore, was authorized by Art. 27, § 645A(e). The Court of Special Appeals erred in dismissing the appeal.

IV.

In *Director v. Cash*, 269 Md. 331, 350-351, 305 A.2d 833, 844 (1973), *cert. denied*, 414 U.S. 1136, 94 S.Ct. 881, 38 L.Ed.2d 762 (1974), this Court noted the State's argument that relief other than the discharge of the prisoner was not "within the purview of proper relief under a petition for habeas corpus," but the Court found it unnecessary to decide the issue in that case. As mentioned earlier, the same issue was raised at oral argument in the present case.

Preliminarily, we note that the order entered in the instant case on July 14, 1988, clearly contemplated the release of Mr. Sutton in one contingency. Under any reasonable construction of the order, if the Institutional Board of Review, after the new hearing, determines that Mr. Sutton should be paroled, and if an application for "revocation of parole is not filed immediately," Mr. Sutton's release on parole is required.

Moreover, and despite the reservation of the question in *Director v. Cash*, *supra*, Maryland cases clearly hold

that it is not inappropriate in a habeas corpus case to grant relief other than the release of the prisoner. While earlier cases may have taken a narrow view of the relief available in a habeas corpus proceeding, more recent cases hold that the judge is entitled to tailor relief as justice may require.

For example, in *Shipley v. State*, 235 Md. 408, 201 A.2d 773 (1964), the judge in a habeas corpus proceeding had found a constitutional infirmity in the prisoner's original trial and had granted him a new trial. This Court specifically rejected the argument that the grant of a new trial was not proper relief in a habeas corpus proceeding. 235 Md. at 411, 201 A.2d at 774.

In *Beard v. Warden*, 211 Md. 658, 661, 128 A.2d 426 (1957), the Court in an opinion by Judge Hammond held that a circuit court in a habeas corpus case could order that a prisoner be granted a belated appeal from his original criminal conviction. To the same effect is *Hardy v. Warden*, 218 Md. 659, 662, 146 A.2d 42 (1958).

Both the *Beard* and the *Hardy* opinions in this Court cited with approval *Dowd v. Cook*, 340 U.S. 206, 209-210, 71 S.Ct. 262, 264, 95 L.Ed. 215 (1951), where the Supreme Court rejected the contention that a judge in a habeas corpus case was required "to choose between ordering an absolute discharge of the prisoner and denying him all relief." The Supreme Court pointed out that a judge "has power in a habeas corpus proceeding to 'dispose of the matter as law and justice require.' " 340 U.S. at 210, 71 S.Ct. at 264. *See Peyton v. Rowe*, 391 U.S. 54, 66-67, 88 S.Ct. 1549, 1555-1556, 20 L.Ed.2d 426 (1968).

Regardless of whether it was proper under the circumstances of this case, the ordering of a new parole hearing was an available type of relief in a habeas corpus case.

V.

The final issue before us is whether Judge DeWaters correctly held that, under the ex post facto clauses of the federal and state constitutions, the requirement of gubernatorial approval could not be applied to a decision by the Institutional Board of Review to parole Mr. Sutton.

Recently in *Anderson v. Dep't of Health & Mental Hyg.*, 310 Md. 217, 224, 528 A.2d 904 (1987), *cert. denied*, 485 U.S. 913, 108 S.Ct. 1088, 99 L.Ed.2d 247 (1988), we set forth certain principles underlying the federal constitution's ex post facto prohibition:

> "[T]he Supreme Court has enunciated the principle that the prohibition extends broadly to 'any law passed after the commission of an offense which . . . "in relation to that offense, *or its consequences*, alters the situation of a party to his disadvantage." ' *Kring v. Missouri*, 107 U.S. 221, 235, 2 S.Ct. 443, 455, 27 L.Ed. 506 (1883), quoting Justice Washington in *United States v. Hall*, 2 Wash.C.C. 366, 26 Fed. Cas. 84, 86 (Case No. 15,285) (1809) (emphasis added). The Supreme Court has also pointed to 'the liberal construction which this court . . . [has given] to the words *ex post facto* law, - a construction in manifest accord with the purpose of the constitutional convention to protect the individual rights of life and liberty against hostile retrospective legislation.' *Kring v. Missouri, supra*, 107 U.S. at 229, 2 S.Ct. at 450."

We also pointed out in *Anderson* that "the ex post facto clause in the Maryland Declaration of Rights has been viewed as having the same meaning as the federal prohibition." 310 Md. at 223, 528 A.2d at 907, and cases there cited.

With regard to retroactive laws changing the consequences of a criminal offense, the ex post facto prohibition

has not been limited to laws directly changing the penalty for the offense. Rather, as the Supreme Court has stated, "any law which was passed after the commission of the offence . . . is an *ex post facto* law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed . . . *or which alters the situation of the accused to his disadvantage*," *In re Medley*, 134 U.S. 160, 171, 10 S.Ct. 384, 387, 33 L.Ed. 835 (1890) (emphasis added). Addressing a state statute which did not change the maximum prison term for an offense, but which did change the mandatory character of the term and the provisions for parole, Justice Stone for the Court in *Lindsey v. Washington*, 301 U.S. 397, 400, 57 S.Ct. 797, 798, 81 L.Ed. 1182 (1937), emphasized that "we compare the practical operation of the two statutes as applied to petitioners' offense." He concluded (301 U.S. at 401-402, 57 S.Ct. at 799): "We need not inquire whether this [statutory change] is technically an increase in the punishment annexed to the crime. . . . It is plainly to the substantial disadvantage of petitioners . . . ."

A recent application of this principle occurred in *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), involving a state statute altering the availability of "gain time" for good conduct in prison and applicable to prisoners whose offenses pre-dated the statute. In considering whether the statute violated the ex post facto prohibition, the Supreme Court initially stated (450 U.S. at 30-31, 101 S.Ct. at 965):

> "Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the [Ex Post Facto] Clause if it is both retrospective and more onerous than the law in effect on the date of the offense."

The Court went on to reject the State's argument that the statute changing prison good conduct time was not

part of the punishment annexed to the crime, saying (450 U.S. at 31-32, 101 S.Ct. at 966):

> "This contention is foreclosed by our precedents. First, we need not determine whether the prospect of the gain time was in some technical sense part of the sentence to conclude that it in fact is one determinant of petitioner's prison term - and that his effective sentence is altered once this determinant is changed. See *Lindsey v. Washington*, 301 U.S. at 401-402, 57 S.Ct. at 799; *Greenfield v. Scafati*, 277 F.Supp. 644 (Mass. 1967) (three-judge court), summarily aff'd, 390 U.S. 713, 88 S.Ct. 1409, 20 L.Ed.2d 250 (1968). See also *Rodriguez v. United States Parole Comm'n*, 594 F.2d 170 (CA7 1979) (elimination of parole eligibility held an *ex post facto* violation). We have previously recognized that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed. *Wolff v. McDonnell*, 418 U.S. 539, 557, 94 S.Ct. 2963, 2975, 41 L.Ed.2d 935 (1974); *Warden v. Marrero*, 417 U.S. 653, 658, 94 S.Ct. 2532, 2535, 41 L.Ed.2d 383 (1974). See *United States v. De Simone*, 468 F.2d 1196 (CA2 1972); *Durant v. United States*, 410 F.2d 689, 692 (CAl 1969). Second, we have held that a statute may be retrospective even if it alters punitive conditions outside the sentence. Thus, we have concluded that a statute requiring solitary confinement prior to execution is *ex post facto* when applied to someone who committed a capital offense prior to its enactment, but not when applied only prospectively."

The Court concluded that the statute altering good conduct time "substantially alters the consequences attached to a

crime already completed" and "is disadvantageous to petitioner and other similarly situated prisoners" because it "lengthens the period that someone in petitioner's position must spend in prison." 450 U.S. at 33, 101 S.Ct. at 966-967. The statute, therefore, was held to violate the ex post facto prohibition.

It is significant that the Supreme Court in *Weaver v. Graham, supra*, 450 U.S. at 32, 101 S.Ct. at 966, specifically relied on cases holding that a statute changing parole eligibility, and applied to prisoners whose crimes occurred before the statute, violated the federal constitution's ex post facto clause. Courts generally have held that statutes making parole more difficult to obtain may not, under the ex post facto prohibition, be applied to prisoners whose offenses occurred before the enactment of the statutes. Recently the United States Court of Appeals for the Fourth Circuit, in *Fender v. Thompson*, 883 F.2d 303, 305-306 (4th Cir. 1989), reviewed some of these cases:

> "Indeed, courts have repeatedly held that 'parole eligibility is part of the law annexed to the crime at the time of a person's offense.' *Schwartz v. Muncy*, 834 F.2d 396, 398 n. 8 (4th Cir. 1987). *See also, e.g., Burnside v. White*, 760 F.2d 217, 220 (8th Cir. 1985) ('There is no question that a new parole statute may alter the consequences attached to a crime for which a prisoner already has been sentenced; [and] to the degree that a statute does so, it has retrospective effect.'); *Lerner v. Gill*, 751 F.2d 450, 454 (1st Cir. 1985) ('parole eligibility is part of the "law annexed to the crime" for ex post facto purposes'); *Beebe v. Phelps*, 650 F.2d 774, 777 (5th Cir. Unit A 1981) ('Since parole eligibility is considered an integral part of any sentence . . . , official port-sentence [sic] action that delays eligibility for supervised release runs afoul of the *ex post facto* proscription.') (quoting *Shepard v. Taylor*, 556 F.2d 648,

> 654 (2d Cir. 1977)); *Rodriguez v. United States Parole Comm'n*, 594 F.2d 170, 176 (7th Cir. 1979) (treating 'possibility of parole as an element of "punishment" '). In turn, they have unvaryingly refused to permit the retrospective application of new or amended statutes or administrative rules which purported, for example, to alter preexisting criteria for the determination of parole eligibility, *Marshall v. Garrison*, 659 F.2d 440, 444-46 (4th Cir. 1981); or revoke accrued 'good time' credits upon the revocation of probationary release granted on the sentence for an offense committed before enactment of the statute, *Beebe*, 650 F.2d at 776-77, or, as a practical matter, simply rescind prior parole eligibility altogether. *Rodriguez*, 594 F.2d at 176."

Judge Phillips for the court then concluded in *Fender* (883 F.2d at 306):

> "The principle underlying each of these decisions is that the retrospective application of a statute modifying or revoking parole eligibility would, '[f]or prisoners who committed crimes before [the statute's] enactment . . . , substantially alter[ ] the consequences attached to a crime already completed, and therefore change[ ] "the quantum of punishment." ' *Weaver*, 450 U.S. at 33, 101 S.Ct. at 966-67 (citing *Dobbert v. Florida*, 432 U.S. 282, 293-94, 97 S.Ct. 2290, 2298-99, 53 L.Ed.2d 344 (1977)). That is, of course, what the statute as applied here effectively accomplishes. It is also, however, precisely what the *ex post facto* clause forbids."

For other cases applying the ex post facto prohibition to retroactive statutory changes making parole more difficult, in addition to the cases cited in *Fender*, *see, e.g.*, *Love v. Fitzharris*, 460 F.2d 382 (9th Cir. 1972), *remanded as*

moot, 409 U.S. 1100, 93 S.Ct. 896, 34 L.Ed.2d 682 (1973); *In Re Griffin*, 63 Cal.2d 757, 48 Cal. Rptr. 183, 408 P.2d 959, 962 (1965); *State v. Hillis*, 748 S.W.2d 694 (Mo. App. 1988); *State v. Beachman*, 189 Mont. 400, 616 P.2d 337, 340-341 (1980); *Goldsworthy v. Hannifin*, 86 Nev. 252, 468 P.2d 350, 352 (1970); *Ex parte Alegria*, 464 S.W.2d 868, 874 (Tex. Cr. App. 1971); *State Ex Rel. Mueller v. Powers*, 64 Wis.2d 643, 646, 221 N.W.2d 692 (1974).

In view of the foregoing cases, it is clear that the requirement of gubernatorial approval for parole by the Institutional Board of Review cannot be applied to Mr. Sutton. Under the statutory scheme in 1974 when his offenses were committed, Mr. Sutton faced the possibility of being adjudicated a defective delinquent, of being sentenced to the Patuxent Institution for an indeterminate term, and of being paroled upon the sole decision of the Institutional Board of Review. In 1975, this possibility became a reality, and Mr. Sutton was determined to be a defective delinquent, was sentenced for an indeterminate term, and could have been paroled based upon the decision of the Institutional Board of Review and no one else. The combined effect of the 1977 and 1982 statutory changes, as applied to Mr. Sutton, was obviously to make parole more difficult to obtain. He now needs the favorable decisions of both the Institutional Board of Review and the Governor in order to be paroled. Moreover, subsequent events have shown that obtaining parole has in fact become more difficult. The retroactive application of the 1977 statute which reimposed a life sentence upon Mr. Sutton, and the 1982 statute requiring gubernatorial approval for parole of those serving a life sentence at Patuxent, has clearly operated to Mr. Sutton's disadvantage.

In arguing that the requirement of gubernatorial approval may validly be applied to Mr. Sutton, Dr. Gluckstern primarily relies upon the Supreme Court's decision in *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). That case involved a statutory change

in trial procedure, an area where retroactive changes have often been upheld as not affecting " 'matters of substance.' " *Dobbert v. Florida, supra*, 432 U.S. at 293, 97 S.Ct. at 2298.[24] The challenged statute in *Dobbert* changed the role of the judge and the jury in sentencing proceedings under the Florida capital punishment statute. Under the former law, in a capital case, the death sentence was automatic absent a jury recommendation of mercy. Under the new law, retroactively applied to the defendant Dobbert, the jury's recommendation was merely advisory. The new statute provided that the jury's recommendation, whether for or against the death sentence, was not binding on the trial judge, and the decision to impose the death sentence was solely that of the trial judge. In addition, the new law contained numerous requirements, not found in the old law, restricting the trial judge in deciding to impose the death penalty.

Turning to the case at bar, Dr. Gluckstern argues that the change in the Maryland law, requiring gubernatorial approval for Mr. Sutton's parole, "is remarkably similar to the change in *Dobbert* - under the old statute, the jury's decision was final and under the new statute, the jury made a recommendation to the judge and he made the

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[24] As we recently pointed out in Anderson v. Dep't of Health & Mental Hyg., 310 Md. 217, 225-226, 528 A.2d 904 (1987), *cert. denied*, 485 U.S. 913, 108 S.Ct. 1088, 99 L.Ed.2d 247 (1988), however,

> "a change in the law which is deemed 'procedural' is not necessarily exempt from the ex post facto prohibition if the change affects substantial rights. *Kring v. Missouri, supra*, 107 U.S. at 232, 2 S.Ct. at 452 ('it is obvious that a law which is one of procedure may be obnoxious as an *ex post facto* law'). *See, e.g., Weaver v. Graham, supra*, 450 U.S. at 29 n. 12, 101 S.Ct. at 964 n. 12; *Thompson v. Utah*, 170 U.S. 343, 354-355, 18 S.Ct. 620, 624, 42 L.Ed. 1061 (1898). A change in the law which imposes the burden of proof upon the individual has been held to be within the ex post facto prohibition. *See, e.g., Cummings v. The State of Missouri, supra*, 4 Wall. at 328; *United States v. Williams*, 475 F.2d 355 (D.C. Cir. 1973)."

final decision." (Gluckstern's brief, p. 21). Apart from the fact that *Dobbert* involved a change in trial procedure whereas the present case involves a change in parole requirements, there is another major difference between *Dobbert* and the present case. In *Dobbert*, under the new Florida statute, the trial judge was substituted for the jury as the sole decision maker. In this case, the requirement of gubernatorial approval for parole is an additional requirement. Now, both the Institutional Board of Review and the Governor must decide in favor of parole. The 1982 statutory change did not make the role of the Board simply advisory or substitute the Governor for the Board. Unlike the situation in *Dobbert*, the effect of the Maryland statutory change was clearly to make the obtaining of parole more difficult.

Finally, Dr. Gluckstern's reliance on *Dobbert* entirely overlooks the one aspect of the *Dobbert* case which is somewhat similar to the case at bar. One of the contentions in *Dobbert* did relate to a provision of the new Florida statute making the obtaining of parole more difficult. The Supreme Court pointed out, however, that this provision was not being applied retroactively because of constitutional considerations. The Court explained (432 U.S. at 298, 97 S.Ct. at 2301):

> "Petitioner's third *ex post facto* contention is based on the fact that the new Florida statute provides that anyone sentenced to life imprisonment must serve at least 25 years before becoming eligible for parole. The prior statute contained no such limitation. The Florida Supreme Court in *Lee v. State*, 294 So.2d 305 (1974), found that this provision restricting parole could not constitutionally be applied to crimes committed prior to its effective date. Petitioner contends that nonetheless its enactment by the Florida Legislature amounts to an *ex post facto*

> law, and that because of this he may successfully challenge the death sentence imposed upon him.
>
> "Petitioner, of course, did not receive a life sentence, and so any added onus attaching to it as a result of the change in Florida law had no effect on him."

Dr. Gluckstern also relies on several cases holding that the ex post facto prohibition was inapplicable to changes by the United States Parole Commission in the Commission's own discretionary guidelines for granting parole. *See Dufresne v. Baer*, 744 F.2d 1543, 1547-1550 (11th Cir. 1984), *cert. denied*, 474 U.S. 817, 106 S.Ct. 61, 88 L.Ed.2d 49 (1985); *Hayward v. United State Parole Com'n*, 659 F.2d 857 (8th Cir. 1981), *cert. denied*, 456 U.S. 935, 102 S.Ct. 1991, 72 L.Ed.2d 454 (1982); *Warren v. United States Parole Commission*, 659 F.2d 183, 193 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950, 102 S.Ct. 1454, 71 L.Ed.2d 665 (1982); *Rifai v. United States Parole Commission*, 586 F.2d 695, 698 (9th Cir. 1978). *See also Portly v. Grossman*, 444 U.S. 1311, 100 S.Ct. 714, 62 L.Ed.2d 723 (1980) (opinion of Circuit Justice Rehnquist denying a stay). As these cases point out, however, the federal parole guidelines "do not have the force and effect of law" but are merely "polic[ies] . . . that show how agency discretion is likely to be exercised," *Dufresne v. Baer*, *supra*, 744 F.2d at 1550. At the time of their offenses, the prisoners were "on notice" that amendments in the federal parole guidelines "might well occur," *id.* at 1548. The guidelines "may not in fact augment [a prisoner's] punishment, either actually or potentially" because "the Parole Commission may choose not to follow the guidelines in [the prisoner's] case," as "[w]hether to follow the guidelines . . . is . . . at the Commission's discretion." *Warren v. United States Parole Commission*, *supra*, 659 F.2d at 193 (emphasis in original deleted). Obviously these cases do not support Dr. Gluckstern's position. The requirement of gubernatorial approval for obtaining a parole does have the force of law, and is

not a discretionary internal policy of the Institutional Board of Review. The requirement is mandatory and clearly makes it more difficult for one in Mr. Sutton's position to obtain parole.

In the present case, Judge DeWaters correctly held that the requirement of gubernatorial approval could not be applied to Mr. Sutton.

JUDGMENT OF THE COURT OF SPECIAL APPEALS VACATED, AND CASE REMANDED TO THAT COURT WITH DIRECTIONS TO AFFIRM THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY. PETITIONER TO PAY COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS.

IN THE COURT OF APPEALS OF MARYLAND

No. 107

September Term, 1988

NORMA GLUCKSTERN

v.

RICHARD LEE SUTTON

Murphy, C.J.
Eldridge
Cole
Rodowsky
McAuliffe
Adkins
*Blackwell,
JJ.

Dissenting Opinion by McAuliffe, J.

Filed: June 7, 1990

I join in Parts I through IV of the Court's opinion. I do not agree with Part V, or with the result, and I therefore dissent.

Chapter 588 of the Acts of 1982, requiring gubernatorial approval for parole of a Patuxent inmate serving a life

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* Blackwell, J., now retired, participated in the hearing and conference of this case while an active member of this Court but did not participate in the decision and addoption of this opinion.

sentence did not "make[ ] more burdensome the punishment for a crime, after its commission." *Beazell v. Ohio*, 269 U.S. 167, 169-170, 46 S.Ct. 68, 70 L.Ed. 216 (1925). Rather, Ch. 588 had the effect of returning Sutton to the same position he was in at the time he committed the murders in 1974. At that time, and at the time of Sutton's sentencing in 1975, a person sentenced to life imprisonment for murder could not be paroled without gubernatorial approval. Code (1957, 1978 Repl. Vol.), Art. 41, §122(b).

Sutton did not gain a potential right to parole without gubernatorial approval until later in 1975 when, as a result of an entirely separate proceeding, he was adjudged a defective delinquent and was transferred to Patuxent Institution. Although the sentencing judge initiated the proceeding by ordering that Sutton be referred to Patuxent for evaluation, and he did so immediately after imposing sentence, the referral formed no part of the sentence. The referral was entirely discretionary. Code, (1957, 1976 Repl. Vol.) Art. 31B, §6. The referral could have been made then, or at a later time, or not at all. Even after referral, Sutton might or might not have been determined to be a defective delinquent.

The possibility of a determination of defective delinquency status and transfer to Patuxent was not a part of the basic framework of imprisonment, parole, and good-time credits that existed at the time Sutton committed his crimes. It existed as a bare possibility that might occur at some time during a defendant's imprisonment. Whether the change of status actually occurred depended in part on whether any of the persons designated by the statute requested an evaluation, the discretion of the trial judge, and whether the defendant would be found by a different court or jury to fit the definition of a defective delinquent.

Originally, the Constitutional prohibition against the passage of *ex post facto* laws condemned any statute that

> "punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed. . . . ."

Beazell v. Ohio, supra, 269 US at 169. Because parole and good-time credits have become an integral part of the ordinary scheme of punishment by imprisonment, *ex post facto* protections have been extended to those areas. That extension, although a long stretch, has generally been viewed as being consistent with the basic concept of fairness that underlies the *ex post facto* clauses. This Court's further stretch of these principles to embrace a benefit associated with a bare possibility, unconnected with the traditional framework of sentencing and parole, is unwarranted.

I would affirm the judgment of the Court of Special Appeals.

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

CASE NO. 87 CM 293

RICHARD LEE SUTTON, #3089

v.

NORMA GLUCKSTERN
Director, Patuxent Institution

AMENDED
OPINION

The Petitioner, Richard Lee Sutton, filed this Petition for Writ of Habeas Corpus alleging that constitutional rights guaranteed by the *ex post facto* clause of Article 1 of the United States Constitution and Article 17 of the Maryland Declaration of Rights have been violated. He contends that legislation since his conviction and commitment to the Patuxent Institution is retrospective and to his disadvantage. The court agrees and grants this writ.

FACTS

The Petitioner was convicted by a jury presided over by the Honorable Walter R. Haile of the Baltimore County Circuit Court on January 10, 1975. On September 4, 1975 he was committed to Patuxent Institution for an indeterminate period after receiving a life sentence plus 12 years. At that time the Board of Review of Patuxent Institution had the power to parole the Petitioner as set out in Article 31B, Section 13(d) of the Annotated Code of Maryland. Under that statute the Board was empowered to parole the Petitioner for one year if it was concluded that such parole was for the benefit of the Petitioner and society.

Parole was for one year subject to review by the Board. The Board could revoke or continue parole and had the power to impose conditions of parole. Subsequently, in 1982 the General Assembly changed the law by passing Article 31B, Section 11(B)(2) which provides as follows:

> If the board of review concludes that (i) it will not impose an unreasonable risk on society; and (ii) it will assist in the treatment and rehabilitation of the eligible person, it shall grant a parole from the Institution for a period not exceeding one year. An eligible person who is serving a term of life imprisonment shall only be paroled with the approval of the Governor. The board of review may attach reasonable conditions to the parole, at any time make reasonable and appropriate modifications of these conditions, and revoke the parole if it finds that the person has violated a condition of the parole. The board of review shall review the person's status prior to the expiration of the parole period, and may extend the parole.

The duties of the Board under the statute passed in 1982 are comparable with the Board's duties under Article 31B, Section 13(d), however, the subsequent statute provides for an additional requirement which is the approval of the governor. The Board voted to grant parole on October 4, 1984 but the governor refused approval.

THE LAW

It has been held that *ex post facto* provisions of the United States Constitution apply to parole cases. *See John S. Marshall, Appellant, V.W.L. Garrison, Warden, Maurice Seigler, Chairman, U.S. Parole Commission, Appellees*, 659 F.2d 440 and cases cited therein. *Hoyt Weaver, Petitioner, v. Robert Graham, Governor of Florida*, 450 U.S. 24, 67 L.Ed.2d 17 set out the elements in *ex post*

facto cases. The opinion dealt with credits against a sentence in a criminal case and held:

> In accordance with these purposes, our decisions prescribe that two critical elements must be present for a criminal or penal law to be *ex post facto*; it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. *Lindsey v. Washington*, *supra*, 301 U.S. at 401, 57 S.Ct. at 799; *Calder v. Bull*, *supra*, at 390. Contrary to the reasoning of the Supreme Court of Florida, a law need not impair a 'vested right' to violate the *ex post facto* prohibition. Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements. *See*, e.g., *Wood v. Lovett*, 313 U.S. 362, 371, 61 S.Ct. 983, 987, 85 L.Ed. 1404 (1941); *Dodge v. Board of Education*, 302 U.S. 74, 78-79, 58 S.Ct. 98, 100, 82 L.Ed. 57 (1937). *See also United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174 101 S.Ct. 453, 459, 66 L.Ed,2d 368 (1980). The presence or absence of an affirmative, enforceable right is not relevant, however, to the *ex post facto* prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consumated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and

more onerous than the law in effect on the date of the offense.

APPLICATION OF THE LAW IN THIS CASE

The Supreme Court has said a law is *ex post facto* if it is retrospective and to the disadvantage of the offender. It seems clear that there has been a change in the law for parole since the Petitioner's commitment to the Patuxent Institution and this change has been applied to him. The law is, therefore, retrospective.

The change was to the Petitioner's disadvantage because it is apparent that without this change the Petitioner would have been paroled pursuant to Article 31B, Sec. 13(d) for the Board of Review at Patuxent Institution voted for such parole in October of 1984. Under the law as it existed at the time of the Petitioner's commitment, parole would have been effected. The change in the statute which requires approval by the Governor prevented parole. Also, the new statute requiring approval by the Governor is to the disadvantage of the Petitioner because it creates an additional step which was not required before. This approval is discretionary and not subject to the same guidelines as the Board of Review or to any guidelines. It demands more than that which was previously required and can only work to the disadvantage of the Petitioner.

In granting this writ the court does not order the release of petitioner but only that he be afforded a hearing applying the law as it existed before the 1982 legislative change. The hearing is to be conducted based only on the facts as they existed when the Board voted for parole in October of 1984. If parole is granted, the Board, if it so desires, can immediately file a parole violation if they deem such action proper and conduct a hearing on any such allegation. Again this hearing must be conducted pursuant to the law as it existed prior to the 1982 legislative change.

/s/
Edward A. DeWaters, Jr.
Administrative Judge
for Baltimore County

/s/
Date

cc: Witold J. Walczak, Legal Aid Bureau, Inc.
Richard Lee Sutton, Petitioner
Norma Gluckstern, Director of Patuxent Institution
Jason G. League, Esq., Assistant State's Attorney
Emory A. Plitt, Jr., Esq., Assistant Attorney General

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY

CASE NO. 87 CM 293

RICHARD LEE SUTTON, #3089
v.
NORMA GLUCKSTERN
Director, Patuxent Institution

* * *

ORDER

In accordance with this Court's original Opinion of January 22, 1988 and its Amended Opinion of March 31, 1988 and for the reasons set forth therein:

IT IS ORDERED this 13th day of July, 1988, as follows:

1. The Institutional Board of Review of the Patuxent Institution is to afford Petitioner a parole hearing. The hearing is to be conducted based solely on the facts and evidence as they existed when the Institutional Board of Review originally considered Petitioner for parole in October of 1984.

2. Should the Board elect to grant parole to Petitioner, such parole shall not be subject to the approval of the Governor of Maryland as provided in Article 31B, Section 11B(2).

3. Should the Institutional Board of Review of the Patuxent Institution grant parole to the Petitioner, the Patuxent Institution is free to seek revocation of such parole by the Institutional Board of Review on the basis of any actions or conduct on the part of the Petitioner occurring after October of 1984.

4. If the Patuxent Institution requests revocation of any such parole of the Petitioner, the Institutional Board of Review shall conduct a hearing on such request in accordance with the provisions of Article 31B of the Code. This Court specifically does not order the release from custody of the Petitioner unless revocation of parole is not filed immediately after the said parole hearing. Hearing on said revocation is to be held immediately unless Richard Lee Sutton requests a continuance to prepare for such hearing. No release to be granted pending hearing on revocation if Richard Lee Sutton requests continuance.

/s/
Edward A. DeWaters, Jr.
Judge
Circuit Court
for Baltimore County

FILED JULY 14, 1988

United States Constitution, Art. I, § 10, cl. 1

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Annotated Code of Maryland, Art. 31B, § 11(b)(2)
(1976 Repl. Vol., 1982 Supp.)

§ 11. Release from Institution.

* * *

(b) *Action by board of review prior to expiration of sentence.* - At any time after transfer of a person to the Institution for treatment as an eligible person but prior to the expiration of the person's sentence, the board of review, upon review of the person may take the following action:

* * *

(2) If the board of review concludes that (i) it will not impose an unreasonable risk on society; and (ii) it will assist in the treatment and rehabilitation of the eligible person, it shall grant a parole from the Institution for a period not exceeding one year. An eligible person who is serving a term of life imprisonment shall only be paroled with the approval of the Governor. The board of review may attach reasonable conditions to the parole, at any time make reasonable and appropriate modifications of these conditions, and revoke the parole if it finds that the person has violated a condition of the parole. The board of review shall review the person's status prior to the expiration of the parole period, and may extend the parole.

Annotated Code of Maryland, Art. 31B, § 11(b)(2)
(1976 Repl. Vol., 1978 Cum. Supp.)

§ 11. Release from Institution.

* * *

(b) *Action by board of review prior to expiration of sentence.*

* * *

(2) If the board of review concludes that (1) it will not impose an unreasonable risk on society and (2) it will assist in the treatment and rehabilitation of the eligible person, it shall grant a parole from the Institution for a period not exceeding one year. The board of review may attach reasonable conditions to the parole, at any time make reasonable and appropriate modifications of these conditions, and revoke the parole if it finds that the person has violated a condition of the parole. The board of review shall review the person's status prior to the expiration of the parole period, and may extend the parole.

Annotated Code of Maryland, Art. 31B, § 13(d)
(1971 Repl. Vol., 1975 Cum. Supp.)

§ 13. Duties.

* * *

(d) *Leave of absence or parole from Institution.* - If the institutional board of review as a result of its review and reexamination of any person believes that it may be for his benefit and for the benefit of society to grant him a leave of absence or parole from the institution for defective delinquents, it may proceed to arrange for such leave or parole. Any leave of absence or parole shall be granted for a period not to exceed one year. The board shall review the case before the expiration of that time and may review it at any time during the year, in order to make further or alternate determination. The board may attach to any such leave of absence or parole such conditions as to it seem wise or necessary, including arrangements for the care and supervision of the person granted a leave or parole, by his friends or relatives, by the institution for defective delinquents or by the Department of Parole and Probation, and also including as a condition that the said person shall be steadily employed or otherwise occupied during the time of such leave or parole. The board may at any time revoke a leave or parole, or change the conditions and arrangments therefore. The board may also request the court which imposed upon the person the original sentence resulting in his being subsequently classified as a defective delinquent, to reinstate the said original sentence; and the said court is authorized and empowered following such a request to reinstate and reimpose the said original sentence, and to cause the said person to be held in custody therefore, as provided hereinbelow.

ORIGINAL

(2)

No. 90-385

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Joseph Henneberry,

Petitioner,

v.

Richard Lee Sutton,

Respondent.

On Petition For A Writ of Certiorari To The Court of Appeals of Maryland

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RESPONDENT'S BRIEF IN OPPOSITION

WITOLD J. WALCZAK*
LEGAL AID BUREAU, Inc.
809 East Baltimore Street
Baltimore, MD 21202
(301) 539-0390

STUART R. COHEN
LEGAL AID BUREAU, Inc.
Candler Building, 7th Floor
714 East Pratt Street
Baltimore, MD 21202
(301) 539-5340

Attorneys for Respondent

*Counsel of record

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Richard Lee Sutton, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment by the Court of Appeals of Maryland in this case. The opinion below is reported at Gluckstern v. Sutton, 319 Md. 634, 574 A.2d 898 (1990); Petition at 1a-43a.

STATEMENT OF THE CASE

Respondent adds the following to the Petitioner's statement of the case. Petition at 2-6.

Patuxent Institution is a nationally unique prison[1] established to treat and rehabilitate inmates with an "intellectual deficiency or emotional imbalance."[2] Patuxent operates independently of, and separate from, all other Maryland state prisons, pursuant to Md. Ann. Code Art. 31B. Decisions to release inmates from the institution have historically been based on considerations of specific deterrence and rehabilitation.[3] There are approximately 600 inmates in the Patuxent program and Petitioner argued below that only 18 of them "may be affected by

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[1] See Watson v. State, 286 Md. 291, 407 A.2d 324, 328 (1979); Sas v. Maryland, 334 F.2d 506, 516 (4th Cir. 1964).

[2] The Institution's statutorily defined purpose is "to provide efficient and adequate programs and services for treatment with the goal of rehabilitation of eligible persons." Md. Ann. Code Art. 31B, §2(b) (1986 Repl. Vol. & 1989 Cum. Supp.). Appendix at 1a. ("Appendix" refers to this brief, whereas "Petition" denotes the Petitioner's submission.).

"Eligible persons" are defined as individuals (1) convicted of a crime and serving a sentence of imprisonment with at least three years remaining; (2) having an "intellectual deficiency or emotional imbalance"; (3) likely to respond favorably to the Institution's treatment programs; and (4) who can be better rehabilitated at Patuxent than in a more traditional prison. Id. §1(f)(1)(i)-(iv). Appendix at 2a.

[3] Patuxent's parole statutes for 1982, 1976, and 1975 are set forth in the Petition at 52a-54a. In essence, parole decisions have focused on two considerations: whether the inmate's release (1) "will not impose an unreasonable risk on society;" and (2) "will assist in [the inmate's] treatment and rehabilitation." Petition at 4a, 52a & 53a.

[this] case."[4]

Contrary to all other Maryland state prisons, prior to 1982 Patuxent had only one level and standard of parole review for inmates serving life sentences.[5] Petition at 4a, 6a-7a. Once the Patuxent Institutional Board of Review (hereinafter "Board") decided that an inmate had satisfied the statutory criteria, page 2, note 3, supra, he or she was paroled. There was no gubernatorial approval requirement. Petition at 4a. The 1982 statutory change at issue did not disturb the Board's review process, but it added a second layer of review in the form of the Governor's approval. Unlike the Board's parole assessment, however, the Governor's review is not statutorily channelled by any considerations, much less specific deterrence and rehabilitation.[6]

On October 4, 1984, the Board voted 5-2 to parole Mr.

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[4] Opposition to Motion to Dismiss and Reply Brief of Petitioner in the Court of Appeals at 7-8.

[5] Every other Maryland state prison operates under the auspices of the Division of Correction (hereinafter "DOC"). Decisions on parole from the DOC are made by the Maryland Parole Commission, which evaluates inmates from a more traditional perspective, one that includes considerations of general deterrence and retribution in addition to rehabilitation and specific deterrence. Md. Ann. Code Art. 41, §4-506 (1986 Repl. Vol. & 1989 Cum. Supp.). Appendix at 3a. The Governor has been required to approve the parole of DOC "lifers" since 1953. Md. Ann. Code Art. 41, §124 (1957); Md. Ann. Code Art. 41, §4-516(b)(4) (1986 Repl. Vol. & 1989 Cum. Supp.); Petition at 4a-5a.

[6] The relevant statutory language read in 1982, and still reads today, as follows: "An eligible person who is serving a term of life imprisonment shall only be paroled with the approval of the Governor." 1982 Md. Laws, Ch. 6; Md. Ann. Code Art. 31B. §11(b)(2). Petition at 8a.

Sutton. Record Extract 18 (hereinafter "E"). The decision was based in part on a psychological evaluation which concluded that Sutton's "characterological problems ... had been modified" and that "all test data show[] no indication of repressed rage or overt tendencies towards violence." Id. If Patuxent had applied the statutory parole scheme in effect on the date of Sutton's offenses, he would have been released on parole in October, 1984. Petition at 36a. However, because of the intervening 1982 statutory change at issue in this case, Patuxent did not release Sutton while awaiting a decision by the Governor. Almost a year later, on September 4, 1985, without having interviewed or met Sutton, the Governor denied the parole without any substantive explanation. E.23.

Pursuant to the Court of Appeals' decision and the Circuit Court's order, the Board paroled Mr. Sutton on August 8, 1990. Petition at 6 n.3. Patuxent did not release Mr. Sutton, holding him on a parole retake warrant pending formal parole revocation proceedings.[7]

On August 30, 1990, the Board, after a hearing, revoked Mr. Sutton's parole for reasons entirely unrelated to the issue presented herein. An appeal of the revocation decision has been noted pursuant to Maryland's Administrative Procedure Act.[8]

Furthermore, on September 27, 1990, the Board voted not to

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[7] See Morrissey v. Brewer, 408 U.S. 471 (1972).

[8] Md. State Gov't Code Ann. §10-201, et seq. (1984 Repl. Vol. & 1990 Cum. Supp.).

reinstate Mr. Sutton on work release and recommended that he again appear before the Board in October, 1990 to determine whether he is still an "eligible person." Should the Board vote to expel him from the program, Mr. Sutton would no longer be subject to Patuxent's jurisdiction, including the statutory provision at issue in this case. He would be returned to the custody of the Division of Correction within 90 days, where any future parole would be subject to the statutes and regulations of the Maryland Parole Commission, Md. Ann. Code Art. 31B, §11(b)(1) (1986 Repl. Vol. & 1989 Cum. Supp.), Appendix at 4a-5a, which have included a gubernatorial approval requirement since long before Sutton's offenses in 1974.[9] See page 3, note 5, supra.

REASONS FOR DENYING THE WRIT

SUMMARY

This case will likely be moot in the near future because the Board has revoked Mr. Sutton's parole and has commenced proceedings to expel him from the program. Even if it is not, the Court of Appeals' decision is a sensible and fair application of relevant ex post facto principles. This Court's subsequent opinion in Collins v. Youngblood[10] endorses the legal reasoning

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[9] Respondent's counsel will notify the Court without delay if and when Mr. Sutton's status changes. Board of License Comm'rs of Town of Tiverton v. Pastore, 469 U.S. 238, 240 (1985) (per curiam) (citation omitted).

[10] ___ U.S. ___, 110 S.Ct. 2715 (1990).

and the outcome of the decision below by reaffirming the applicability of the Ex Post Facto Clause to statutory changes that increase punishment. There is no direct conflict among the courts of the several states on the issue. To the contrary, the one truly similar case, State v. Williams,[11] is in accord. Finally, Petitioner's assertion that the decision "discourag[es] innovation" and will "bar[] states from changing parole procedures," Petition at 7, dramatically overstates the importance of the case.

I. SHOULD CERTIORARI BE GRANTED, THIS CASE WILL LIKELY BE MOOT AT THE TIME OF REVIEW.

Mr. Sutton's revocation from parole leaves in doubt the justiciability of this case. U.S. Const. Art. III, §2, cl. 1. His petition for a writ of habeas corpus sought only injunctive relief, namely, his release on parole. E.10.[12] The requested relief was granted on August 8, 1990 when the Board ordered Mr. Sutton's parole. Petition at 6 n.3.

In proceedings independent of this case, the Board revoked Sutton's parole on August 30, 1990. So although the case would not have been moot had Sutton remained on parole, id., the subsequent revocation means that the "issues presented are no longer live [and] the parties lack a legally cognizable interest

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[11] 397 So. 2d 663 (Fla. 1981).

[12] There is no damage claim, E.7-10, nor has class action status been requested or granted.

in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969). Whether or not the Governor is permitted to veto Sutton's parole is immaterial since Sutton is no longer under consideration for parole.[13] The Board could again recommend Sutton for parole in the future, but the fact that they are recommending that he be found "non-eligible" for the program indicates their current belief that he is not likely to be rehabilitated. See page 2, note 2, supra (definition of "eligible person"). This "Court has never held that a mere physical or theoretical possibility [of recurrence] was sufficient to satisfy the [capable of repetition yet evading review] test...." Murphy v. Hunt, 455 U.S. 478, 482 (1982).

If Mr. Sutton is determined to be a "non-eligible" person and is returned to the custody of the DOC, he will no longer be subject to the statute at issue, and the case will be moot because "in no event will the status [of Sutton] now be affected by any view this Court might express on the merits of this controversy." Defunis v. Odegaard, 416 U.S. 312, 316 (1974). See Honig v. Doe, ___ U.S. ___, ___, 108 S.Ct. 592, 601 (1988) (respondent's claim moot because no longer entitled to protections of statute at issue); Board of School Comm'rs of City of Indianapolis v. Jacobs, 420 U.S. 128, 129 (1975) (graduation of plaintiffs who challenged school rule moots claims).

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[13] Resolution of Mr. Sutton's appeal of the parole revocation decision will take several months. It is an intangible that further obscures the justiciability of the case.

II. COLLINS V. YOUNGBLOOD ENDORSES THE REASONING OF THE COURT OF APPEALS BY REAFFIRMING THE APPLICABILITY OF THE EX POST FACTO CLAUSE TO STATUTORY CHANGES THAT INCREASE PUNISHMENT.

The Court of Appeals' decision is fully consistent with this Court's subsequent opinion in Collins v. Youngblood, despite the fact that Youngblood overruled two cases cited by the court below.

The issue in Youngblood was whether changes in a post conviction remedy were subject to the Ex Post Facto Clause. In deciding that they were not, the Court clarified the scope of the clause. Language in Kring v. Missouri, 107 U.S. 221, 228-229 (1883) (any change which "alters the situation of a party to his disadvantage"), and Thompson v. Utah, 170 U.S. 343, 352 (1898) (any change that deprives defendant of "a substantial right"), had "caused confusion in state and lower federal courts about the scope of the Ex Post Facto Clause...", Youngblood, ___ U.S. at ___, 110 S. Ct. at 2722 (emphasis added), and had resulted in an unjustified "enlargement" of the Clause. Id. at ___, 110 S. Ct. at 2721. The Court reiterated that its "early opinions" established "an exclusive definition of ex post facto laws." Id. at ___, 110 S. Ct. at 2719 & 2721 ("The prohibition which may not be evaded is the one defined by the Calder categories."). Accordingly, the four categories set out in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798),[14] and restated in Beazell v. Ohio, 269

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[14] The four Calder categories are:

1st. Every law that makes an action done

U.S. 167, 169-70 (1925), define the scope of the clause. Youngblood, ___ U.S. at ___, 110 S. Ct. at 2720 & 2721.

Youngblood reaffirms the longstanding proposition that the Ex Post Facto Clause prevents legislatures from retroactively increasing the punishment for criminal acts. ___ U.S. at ___, 110 S.Ct. at 2719-20. To the extent statutory changes make parole more difficult to obtain, they also make more burdensome the punishment for the crime and increase the effective sentence by "the reduced opportunity to shorten ... time in prison...." Weaver v. Graham, 450 U.S. 24, 33-34 (1981).

The Supreme Court has expressly recognized the applicability of the Ex Post Facto Clause to good time credits, which reduce the amount of time inmates must actually spend in prison. Weaver v. Graham, supra. The Court stated that such credits were "one determinant of ... a prison term -- and [the] effective sentence is altered once this determinant is changed." 450 U.S. at 32 & 34. Weaver specifically relied on a case holding that a statute delaying parole eligibility violated the Ex Post Facto Clause,

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> before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

3 U.S. (3 Dall.) at 390 (emphasis in original).

id. at 31-32, citing Rodriguez v. United States Parole Comm'n, 594 F.2d 170 (7th Cir. 1979), a fact noted in the Court of Appeals' opinion. Petition at 34a.[15]

Weaver also cited with approval several earlier Supreme Court cases that implicitly or in dicta affirmed application of the Ex Post Facto Clause to parole. 450 U.S. at 32. In Greenfield v. Scafati, 277 F. Supp. 244 (D. Mass. 1967) (three-judge court), summarily aff'd, 399 U.S. 713 (1968), Massachusetts had changed its law to permit forfeiture of good time deductions for a violation of parole. In holding unconstitutional the retrospective application of the law, the district court stated that there was "no distinction between depriving a prisoner of the right to earn good conduct deductions and the right to qualify for, and hence earn, parole." 277 F. Supp. at 646. In Warden, Lewisburg Penitentiary v. Marrero, the Court stated in dicta that:

> a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause ... of whether it imposed a "greater or more severe punishment than was prescribed by the law at the time of the ... offence...."

417 U.S. 653, 663 (1974) (emphasis in original) (citations

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[15] Petitioner contends that the Court of Appeals' reliance on Kring v. Missouri, 107 U.S. 221, 2 S.Ct. 443 (1883), which was overruled by Youngblood somehow renders the decision infirm. The reference to Kring by the court below is preliminary language in the introductory section of the discussion. 31a-32a. Excision of it does not materially affect the disposition. The Court of Appeals relied on Weaver v. Graham and numerous other cases for the proposition that retrospectively applied changes in parole are subject to ex post facto scrutiny. Petition at 32a-36a.

omitted).[16]

Weaver also spoke generally of "a prisoner's eligibility for reduced imprisonment" as a significant factor in defendants' decisions to plea bargain and judges' sentence calculations. 450 U.S. at 32. This supports the proposition that good time credits and parole are a determinant of a defendant's punishment. See Marrero, 417 U.S. at 658.

Federal appeals courts have unvaryingly held applicable the Ex Post Facto Clause to parole, following Weaver, Greenfield and Marrero.[17]

Given the uniform application of the Ex Post Facto Clause to parole changes, the Court of Appeals' decision is well within the parameters of pre-Youngblood case law, the overruling of Kring and Thompson notwithstanding. Since changes in parole directly impact on "punishment," squarely falling within the third of the Calder categories, the Court of Appeals' decision also is in line with Youngblood.

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[16] Marrero also cites Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972), where the court of appeals held unconstitutional the agency's new statutory interpretation that delayed the offender's parole eligibility. 417 U.S. at 663.

[17] See, e.g., Parton v. Armontrout, 895 F.2d 1214 (8th Cir. 1990); Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989); Devine v. New Mexico Dep't of Corrections, 866 F.2d 339 (10th Cir. 1989); Watson v. Estelle, 859 F.2d 105 (9th Cir. 1988); Burnside v. White, 760 F.2d 217, 220 (8th Cir. 1985), cert. denied, 474 U.S. 1022; Lerner v. Gill, 751 F.2d 450 (1st Cir. 1985), cert. denied, 472 U.S. 1010; United States Ex Rel. Graham v. United States Parole Comm'n, 629 F.2d 1040, 1043 (5th Cir. 1980); Rodriguez v. United States Parole Comm'n, 594 F.2d 170 (7th Cir. 1979); Gheraghty v. United States Parole Comm'n, 579 F.2d 238, 265 (3rd Cir. 1978); Shepard v. Taylor, 556 F.2d 648, 654 (2nd Cir. 1977).

The focus of the case, therefore, shifts to whether the gubernatorial approval requirement "disadvantaged" Sutton. Miller v. Florida, 482 U.S. ___, ___, 107 S. Ct. 2446, 2451 (1987).[18] Again, Youngblood implicitly affirms and strengthens the decision below. Chief Justice Rehnquist, writing for the Court in Youngblood, stated as follows:

> [S]imply by labeling a law "procedural," a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause. ... Subtle ex post facto violations are no more permissible than overt ones.

___ U.S. at ___, 110 S. Ct. at 2721 (citation omitted).

In this case, the Court of Appeals determined that the 1982 law disadvantaged Sutton, not only by making parole objectively more difficult to obtain, but also because it had "in fact become more difficult" since the Governor had vetoed the Board's parole recommendation. Petition at 36a.[19] The Governor's denial of

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[18] It is beyond dispute that Patuxent has applied the law retrospectively, Petition at 8a-9a, which satisfies the first Miller criterion.

[19] The 1982 law imposes a more onerous burden on inmates by expanding the reasons for which parole can be denied. The Board's discretion is channelled by the Institution's enabling statute, which requires it to consider the inmate's risk to society and the extent of his rehabilitation. Md. Ann. Code Article 31B, §11(b)(2) (1986 Repl. Vol.); Petition at 52a, 53a, 54a. Conversely, Md. Ann. Code Art. 31B, §11(b)(2) legislates no standards or guidelines circumscribing the Governor's decision. The absence of standards is, a fortiori, a different set of criteria than that binding Patuxent's Board. Moreover, as the State's highest elected official, the Governor is susceptible to shifting political winds and the pressures of public opinion in a way the parole board is not. The fact that the Governor's decision is made without any personal interaction with the inmate lends credence to the proposition that he considers factors other than whether the inmate has been rehabilitated and is no longer a threat to public safety.

parole to twelve inmates who were approved by the Board[20] is evidence that the standards applied by the Governor are more onerous than those of the Board. Unlike in Dobbert v. Florida,[21] where the change in law could result in a life sentence rather than the death penalty for the defendant, see discussion at page 14, note 22, infra, here the Governor is not permitted to parole individuals whom the Board does not first approve.

Under the circumstances, the disadvantage to Sutton is substantially more than "de minimis," having kept Sutton incarcerated for almost six years after the Board's decision to parole him.

III. THERE IS NO REAL CONFLICT BETWEEN THE COURT OF APPEALS' DECISION AND THAT OF OTHER STATES. INDEED, THE ONE FACTUALLY SIMILAR CASE IS CONSISTENT WITH THIS ONE.

The allegedly conflicting decisions cited by Petitioner are distinguishable on their facts. These cases, in the Petitioner's words, changed the "identity and/or size of the parole or release decision maker." Petition at 12. Not one of the cases added a new and second level of review, as occurred herein. Accordingly, these cases are distinguishable on the ground that there is no evidence of disadvantage, and the respective courts' holdings are

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[20] Emergency Motion of the State of Maryland For Stay of Judgment of The Maryland Court of Appeals Pending Filing and Disposition of Petition For Writ of Certiorari, Case No.: A-19 (filed July 5, 1990) at 5 n.5. The application was denied on July 9, 1990.

[21] 432 U.S. 282 (1977).

premised precisely on this point.[22]

In cases where the composition or size of a decision-making body is altered, there is no change in the standard or measure for getting parole. Furthermore, under those circumstances it is virtually impossible to demonstrate that the former decision-maker would have acted more benevolently toward the prisoner than the existing board. Here, where a second reviewing authority is

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[22] The death penalty law changes at issue in Dobbert v. Florida, 432 U.S. 282, 293 (1977), were not disadvantageous, i.e., "no change in the quantum of punishment attached to the crime." Id. at 294. On the contrary, the Dobbert Court determined that the net effect of the changes was "ameliorative." Id. at 296. See also id. at 303-304 (Burger, C.J., concurring). The Court held that the law was passed with the intent to provide, and in effect did furnish, more judicial protection for defendants in capital cases by making it more difficult to issue death penalties. Id. at 295. The changes in the instant case cannot be characterized as ameliorative, nor were they intended to improve the opportunities for release from Patuxent. The Court of Appeals distinguished Dobbert on these grounds and on the basis that in Dobbert "the trial judge was substituted for the jury as the sole decision maker," whereas the gubernatorial approval provision is an "additional requirement." Petition at 37a-38a.

The Petitioner's other citations are no more apposite. State v. Valenzuela, 144 Ariz. 43, 659 P.2d 732 (1985) (change substituting commissioner of corrections for parole board to determine good time forfeitures not disadvantageous); Perkey v. Psychiatric Security Board, 65 Or. App. 259, 670 P.2d 1061, 1063 (1983) ("[T]he change has not prejudiced him in any way...."); Mayfield v. Ford, 664 F. Supp. 1285, 1289 (D. Neb. 1987) ("[N]othing in the statute gives any indication that a patient's commitment will be increased. In fact, it could just as easily be shortened...."); Taylor v. Lane, 191 Ill. App. 101, 546 N.E.2d 1178, 1180-81 (1989) ("[I]ncrease in number of Board members may actually increase petitioner's chances for parole."); United States ex Rel. Chaka v. Lane, 685 F. Supp. 1069, 1072 (N.D. Ill. 1988) ("merely codifies prior law" and therefore is not disadvantageous); Gilmore. v. Kansas Parole Board, 243 Kan. 173, 756 P.2d 410, 415-16, cert. denied, 488 U.S. 930 (1988) (increase in percentage of votes needed to get parole not unconstitutional because internal administrative policy decision not fixed by legislature).

added to, and given veto power over, an existing one, disadvantage is demonstrable. But for the new law introducing the Governor into the parole decision-making scheme, Mr. Sutton would have been released on parole in 1984. The statutory change not only imposes a higher standard for attaining parole, but also actually disadvantaged Sutton.

In one case that is factually similar to this one, State v. Williams, 397 So. 2d 663 (Fla. 1981), the Florida Supreme Court held exactly as did the Court of Appeals of Maryland. In Williams, subsequent to the commission of the offense but prior to trial and sentencing, Florida's legislature passed a law permitting the trial courts to retain jurisdiction for the first one third of the sentence, which allowed the judges to veto paroles. Id. at 664. In holding unconstitutional the retrospective application of the law, the Florida Supreme Court stated that "[the change] in effect imposes an additional requirement before a prisoner can be paroled: he must obtain the approval of both the parole commission and the trial court, as compared to just the commission's approval as it was under the prior law," id., and therefore the "consequences [of the law] have a disadvantageous effect in that the prisoners' sentences are enhanced." Id. at 665.

IV. THE EFFECT OF THE DECISION IS LIMITED TO A UNIQUE SETTING.

The decision affects only a handful of Patuxent inmates, estimated by Petitioner to be 18. See pages 2-3, supra. Moreover, Petitioner has not directed this Court to other states

with similar parole configurations facing ex post facto challenges, and respondent's counsel is not aware of any. The case is limited to the Patuxent Institution.

Petitioner's apocalyptic argument that the decision will prevent states from improving their criminal justice systems and "discourage[] innovation" (pages 6-7) is belied not only by the Ex Post Facto Clause itself, but by recent legislation in Maryland and elsewhere. As the constitutional provision applies only to retrospective changes, new parole and criminal justice measures can always be applied prospectively without running afoul of the Article I proscription. Indeed, the federal government and many states have, for ex post facto reasons, set up different parole and gain time policies depending on the date of an inmate's offense.[23]

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[23] Upon deciding to eliminate parole in the federal system, Congress enacted an elaborate scheme to safeguard the parole opportunities of inmates whose offenses occurred before repeal of the law. See 18 U.S.C. §3551 (historical note)(1985); Pub. L. No. 98-473, 98 Stat. 1988 (1984) (repealing 18 U.S.C. §4201, et seq. (1990 Cum. Supp.)). In Maryland, the Parole Commission has three separate sets of parole standards, depending on the date of an inmates's offense. Maryland Parole Commission Guidelines 2-7, 2-7A, and 2-1. See also Barksdale v. Franzen, 700 F.2d 1138, 1040-41, n.2 (7th Cir. 1983)(Illinois good time policy); State v. Valenzuela, 695 P.2d 732 (Ariz. 1985) (Arizona good time policy).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

WITOLD J. WALCZAK*
LEGAL AID BUREAU, Inc.
809 East Baltimore Street
Baltimore, MD 21202
(301) 539-0390

STUART R. COHEN
LEGAL AID BUREAU, Inc.
Candler Building, 7th Floor
714 East Pratt Street
Baltimore, MD 21202
(301) 539-5340

Attorneys for Respondent

*Counsel of record

List of Appendices

§ 2. Institution created and continued; purpose.

(a) The Patuxent Institution is created and continued as part of the Department.

(b) The purpose of the Institution is to provide efficient and adequate programs and services for treatment with the goal of rehabilitation of eligible persons. This shall include a range of program alternatives indicated by the current state of knowledge to be appropriate and effective for the population being served. As an integral part of the program an effective research and development effort should be established and maintained to evaluate and recommend improvements on an on-going basis. (1977, ch. 678, §§ 6, 7; 1989, chs. 6, 7.)

Effect of amendment. — Chapters 6 and 7, both approved Mar. 20, 1989, and effective from date of passage, made identical changes. Each in (b), substituted "treatment with the goal of" for "the treatment and" in the first sentence.

§ 1. Definitions.

(a) In this article, the following words have the meanings indicated unless the context clearly requires otherwise.

(b) "Board of review" means the institutional board of review, created by § 6.

(c) "Commissioner" means the Commissioner of Correction.

(d) "Department" means the Department of Public Safety and Correctional Services.

(e) "Director" means the director of Patuxent Institution.

(f) (1) "Eligible person" means a person who (i) has been convicted of a crime and is serving a sentence of imprisonment with at least three years remaining on it, (ii) has an intellectual deficiency or emotional unbalance, (iii) is likely to respond favorably to the programs and services provided at Patuxent Institution, (iv) can be better rehabilitated through those programs and services than by other incarceration, and (v) meets the eligibility criteria established by the Secretary under § 8 of this article.

(2) "Eligible person" does not include a person who (i) is serving 2 or more sentences of imprisonment for life under the provisions of Article 27, § 412 of the Code, (ii) is serving 1 or more sentences of imprisonment for life when a court or jury has found, beyond a reasonable doubt, that one or more aggravating circumstances existed under the provisions of Article 27, § 413 of the Code, or (iii) has been convicted of murder in the first degree, rape in the first degree, or a sexual offense in the first degree, unless the sentencing judge, at the time of sentencing or in the exercise of the judge's revisory power under the Maryland Rules, recommends that the person be referred to the Institution for evaluation.

(g) "Evaluation team" means a team of at least three professional employees of the Institution, one of whom shall be a social worker or behavioral scientist, one a psychologist, and one a psychiatrist.

(h) "Institution" means the Patuxent Institution.

(i) "Secretary" means the Secretary of Public Safety and Correctional Services.

(j) "Victim" means:

(1) A person who suffers personal physical injury or death as a direct result of a crime; or

(2) If the victim is deceased, a designated family member of the victim. (1987, ch. 164; 1989, chs. 6, 7.)

Effect of amendment. — The 1987 amendment, effective July 1, 1987, in subsection (g), designated the provisions of the subsection as paragraph (1), redesignated former items (1), (2), (3), and (4) as present items (i), (ii), (iii), and (iv) therein, and added paragraph (2).

Chapters 6 and 7, both approved Mar. 20, 1989, and effective from date of passage, made identical changes. Each deleted former (b) and redesignated the remaining subsections accordingly; in (f), deleted "and" preceding "(iv)" in (1) and "or" preceding "(ii)" in (2) and added (v) in (1) and (iii) in (2); and added (j).

§ 4-506. Matters to be considered at hearing.

Each hearing examiner and Commission member determining if an inmate is suitable for release on parole shall consider:

(1) The circumstances surrounding the crime;

(2) The physical, mental, and moral qualification of the inmate eligible for parole;

(3) The progress of the inmate during his confinement, including the academic progress of the inmate in the mandatory education program required in § 22-102 of the Education Article;

(4) Whether or not there is reasonable probability that the inmate, if released on parole, will remain at liberty without violating the law;

(5) Whether or not release on parole of the inmate is compatible with the welfare of society;

(6) An updated victim impact statement or recommendation prepared under § 4-504 (d) of this subtitle; and

(7) Any recommendation made by the sentencing judge at the time of sentencing. (1976, ch. 540, §§ 1, 3; 1986, ch. 5, § 4; 1987, ch. 11, § 2; ch. 621; 1988, ch. 6, § 1; ch. 486.)

MD. ANN. CODE ART. 31B, section 11 (1986 Repl. Vol. & 1989 Cum. Supp.).

§ 11. Release from Institution.

(a) *Upon expiration of sentence.* — A person confined at the Institution shall be released upon expiration of his sentence in the same manner and subject to the same conditions as if he were being released from a correctional facility. The director shall notify the Commissioner 30 days prior to the release.

(b) *Action by board of review prior to expiration of sentence.* — After transfer of a person to the Institution for treatment as an eligible person but prior to the expiration of the person's sentence, the board of review, upon review of the person may take the following action:

(1) If the board of review concludes that the person is no longer an eligible person but should remain confined until released on parole in accordance with normal Parole Commission standards or expiration of his sentence or the inmate requests a transfer in writing, the director shall notify the Commissioner and send him a copy of the evaluation team's report. Within 90 days after that notice, the person shall be delivered to the appropriate correctional facility designated by the Commissioner. This transfer shall not affect any right to parole consideration that the person may then have.

(2) If the board of review concludes that (i) it will not impose an unreasonable risk on society; and (ii) it will assist in the treatment and rehabilitation of the eligible person, it may grant a parole from the Institution for a period not exceeding one year.

(3) An eligible person who is serving a term of life imprisonment shall only be paroled with the approval of the Governor.

(4) Except as provided in paragraph (5) of this subsection, a person who has been sentenced to life imprisonment for rape in the first degree, a sexual offense in the first degree, or murder in the first degree is not eligible for parole until the person has served 15 years or the equal of 15 years when considering allowances for diminution of the period of confinement provided for in Article 27, §§ 638C and 700 of the Code.

(5) A person who has been sentenced to life imprisonment as a result of a proceeding under Article 27, § 413 of the Code is not eligible for parole until the person has served 25 years or the equal of 25 years when considering the allowances for diminution of the period of confinement provided for in Article 27, §§ 638C and 700 of the Code.

(6) The board of review may attach reasonable conditions to the parole, at any time make reasonable and appropriate modifications of these conditions, and revoke the parole if it finds that the person has violated a condition of the parole. The board of review shall review the person's status prior to the expiration of the parole period, and may extend the parole.

CONT'D

(c) *Notice of hearing and decision to victim; comment.* — (1) The board of review shall provide by mail written notice of an eligible person's parole hearing to the victim.

(2) The board of review shall give the victim a reasonable opportunity to comment on the parole in writing before the board decides whether to grant parole to an eligible person.

(3) The board of review shall promptly notify the victim of the decision of the board of review regarding parole.

(4) The victim may designate, in writing to the board of review, the name and address of a representative, who is a resident of the State, to receive notice for the victim.

(5) The board of review shall delete the victim's address and phone number before examination of any document by the eligible person or the eligible person's representative.

(d) *Approval by Secretary.* — The board of review may not release an eligible person on parole until the parole decision has been approved by the Secretary.

(e) *Completion of three years on parole.* — If a person has successfully completed three years on parole without violation, and the board of review concludes that he is safe to be permanently released, it may, through the director, petition the court that last sentenced the person to (1) suspend the person's remaining sentence and terminate parole supervision upon the conditions the court deems appropriate or (2) vacate the person's remaining sentence. Notice of this petition shall be served upon the victim and the State's Attorney that last prosecuted the person, and the State's Attorney shall be a party to the proceeding. After a hearing, the court may either grant or deny the relief requested in the petition. (1977, ch. 678, §§ 6, 7; 1982, ch. 588; 1988, ch. 438; 1989, chs. 6, 7.)

Effect of amendment. — The 1988 amendment, effective July 1, 1988, reenacted the section without change.

Chapters 6 and 7, both approved Mar. 20, 1989, and effective from date of passage, made identical changes. Each designated the former second sentence of (b) (2) as present (b) (3); inserted present (b) (4) and (b) (5); designated the former third and fourth sentences of (b) (2) as present (b) (6); inserted present (c) and (d); redesignated former (c) as present (e); in (b), substituted "after" for "at any time after" in the introductory language and "may" for "shall" in (2); and in (e), inserted "victim and the" in the second sentence.

LEGAL AID BUREAU, INCORPORATED
PRISONER ASSISTANCE PROJECT
809 E. BALTIMORE STREET
BALTIMORE, MARYLAND 21202
(301) 539-0390

JAMES J. NOLAN, JR., PRESIDENT

CHARLES H. DORSEY, JR.
HARRIETTE TAYLOR
STUART A. COHEN

WITOLD WALCZAK
NORMAN HANOWERGER
FRANCES E. KESSLER
JOSEPH B. TETRAULT
ADAIR CLARKE
CHRISTOPHER ALI

October 4, 1990

HAND-DELIVERED

Joseph F. Spaniol, Jr., Clerk
Supreme Court of the United States
Supreme Court Building
1 First Street, N.E.
Washington, D.C. 20543

RE: Joseph Henneberry v. Richard Lee Sutton
October Term, 1990; No.: 90-385

Dear Mr. Spaniol:

I enclose for filing one copy of Respondent's Brief In Opposition, a Motion for Leave to Proceed *In Forma Pauperis* and supporting Affidavit, and a Rule 29 Certificate of Service.

Very truly yours,

Witold J. Walczak
Attorney for Respondent

cc: Evelyn O. Cannon, Esq.

(3)

No. 90-385

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH HENNEBERRY,

Petitioner,

v.

RICHARD LEE SUTTON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

EVELYN O. CANNON*
ANDREW H. BAIDA
EMORY A. PLITT, JR.
Assistant Attorneys General
200 St. Paul Place, 20th Flr.
Baltimore, Maryland 21202
(301) 576-6330

Attorneys for Petitioner

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

REPLY ARGUMENT

THIS CASE PRESENTS A LIVE AND CONTINUING CONTROVERSY

Respondent suggests this case is or "will likely be moot in the near future", Respondent's Brief at 5, because the State has revoked his parole and commenced proceedings to remove him from Patuxent Institution. There is no merit to this suggestion.

The State continues to challenge respondent's parole because that parole has not received the approval of the governor as required by Md. Ann. Code, Art.

31B, § 11(b)(2) (1976 Repl. Vol., 1982 Cum. Supp.). Therefore, the Board's decision of August 8, 1990, to parole respondent does not moot this case, *see Mabry v. Johnson*, 467 U.S. 504, 507 n.3 (1984); *Jago v. Van Curen*, 454 U.S. 14, 21 n.3 (1981); *Jones v. Cunningham*, 371 U.S. 236 (1963), and respondent does not claim to the contrary. *See* Respondent's Brief at 6 ("the case would not have been moot had Sutton remained on parole").

Nor has this case been mooted by the Board's revocation of respondent's parole because respondent is challenging that revocation. *See* Respondent's Brief at 4. If that challenge is successful, respondent will be paroled, in accordance with the decision below, without the governor's approval. Thus, "these same parties are reasonably likely to find themselves again in dispute over the issues raised in th[e] petition. . . ." *Burlington Northern Railroad Company v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, ___ n.4, 107 S.Ct. 1841, 1846 n.4 (1987). *See also Honig v. Doe*, 484 U.S. 305, ___ n.6, 108 S.Ct. 592, 601 n.6 (1988). This case thus involves facts quite unlike those present in *Murphy v. Hunt*, 455 U.S. 478, 482 (1982), where the party "no longer had a legally cognizable interest in the result in this case." Similarly, the mere fact that respondent may be transferred to another institution at some unspecified time in the future does not moot this case. *Compare with Weinstein v. Bradford*, 423 U.S. 147, 148 (1975) (case moot where "respondent can have no interest whatever in the procedures followed by petitioners in granting parole").

Finally, even if this case were moot, which it is not, the proper disposition of this petition would be

to grant certiorari, vacate the judgment below, and remand the case with directions that the case by dismissed as moot, *see United States v. Munsingwear*, 340 U.S. 36, 39 (1950), and not, as respondent urges, to deny the petition.

CONCLUSION

For the reasons stated in the State's petition, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland. Following review, that judgment should be reversed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

EVELYN O. CANNON*
ANDREW H. BAIDA
EMORY A. PLITT, JR.
Assistant Attorneys General
200 St. Paul Place, 20th Flr.
Blatimore, Maryland 21202
(301) 576-6330

Attorneys for Petitioner

**Counsel of Record*